Orleans Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

By FRANCOIS-XAVIER MARTIN,

ONE OF THE JUDGES OF SAID COURT.

VOL. I.....PART III.

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DAUBLIN vs. *MAYOR &c. OF NEW-ORLEANS.* FALL 1810. First District.

Corporation may remove houses built in the streets.

THE Plaintiff stated he was in possession of a lot of ground in the faubourg St. Mary, whereupon he had built a house and defendants sent the forgats or galley slaves, who pulled down and destroyed the house and drove off the plaintiff from the premises.

THE defendants admitted the demolition of the house by their order, but justified it on the ground, that it was a new house, and was built in one of the streets of the said faubourg. Issue being joined:

THE city-surveyor proved, that hearing that the plaintiff was building a house in the street he went on the premises, and drew he line of the street, on which he directed the plaintiff to place the house, at a time when three tiers of bricks only were laid. Nevertheless the plaintiff went on, and placed his house eighteen feet in the street.

SOME doubt arose on the accuracy of the line drawn by the city-surveyor, but the cause principally turned on the question whether admiting that the house was in the street, the defendants could lawfully demolish it.

Duncan and *Moreau* for the defendants. Any one may pull down or otherwise destroy a common nuisance as a new gate or even a new house erected on the highway. 3 *Bac. Abr.* 687.

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DAUBLIN vs. MAYOR OF N. ORLEANS.

If one puts wood in the street before his house it is a nuisance. 3 *Com. Dig.* 28.

THE Corporation are by law authorised to make bye-laws for the regulation of the streets *Acts Leg. Co. p.* 15, and in pursuance thereto they have enacted, *Ord. Corp. p.* 87 that every house to be built should be erected on the line of the street, to be given by the city-surveyor, and that every building erected in the street should be demolished at the expence of the owner.

BY the 3 *part. lib.* 23. *tit.* 32. If a house be built on the street, or on the commons, the Corporation may destroy it. *Greg. Lopez's* note.

Mazureau and *Paillette* for the plaintiff. The authorities cited from *Bacon* and *Comyns* are evidence of the common law of England, but we are not in this territory regulated by that law.

THE ordinance of the Corporation cannot avail the defendants, because it is contrary to the Constitution of the U. S. and contrary to the laws of the territory, and their power to make ordinances is limited by their charter—their ordinances, when contrary to that constitution and those laws, are void.

THE laws of Spain as they were at the cession, are the laws of the territory, and every ordinance of the corporation repugnant thereto is void.

THE ordinance cited is contrary to one of the *Leyes del Ordonamiente Real, Ley.* 2. *lib.* 3, *tit.* 14. re-enacted in the *Recopilacion de Castilla, Ley* 1. *lib.* 4, *tit.* 13. to *Curia Philipica* 175 *Art:* 22.

THESE laws expressly provide that if the corporation of any city are disseised of any of their land, they shall bring suit therefore, and if they use force to regain possession they shall forfeit their title to the premises.

By the Court, MARTIN *J. alone.* There is no necessity to determine whether according to the laws of this territory a nuisance may be abated by any individual.

THE ordinance of the corporation is not repugnant to the constitution of the U. S. nor to any of the laws of the Territory.

THE Spanish Laws quoted by the plaintiff's counsel relate only to lands belonging to the corporation, as their private property.

STREETS are not the property of any one, they belong to the whole community. They are not the property of the corporation, for if they were the corporation could exclude the whole world from the use of them—on the contrary the use of them belongs to the whole world. They are *hors de commerce*, and cannot be the object of a contract of sale, *Pothier Contract de Vente* 13.

THEY have not seised the premises—they have only removed an obstruction—they have taken no possession.

FALL 1810. First District.

WHETON vs. TOWNSEND.

THE 3d *partida* and the commentary of *Greg. Lopez* are authorities in point and accord with the Roman Law. *Curent autem.....Ædiles.....ut nullus effodiat vias—neque construat in viis aliquid....si liber demonstretur ædilibus. Ædiles autem multent eum secundum legem, and quod factum est dissolvant ; Dig. lib.* 43, *tit.* 10.

JUDGMENT FOR THE DEFENDANTS.

WHETTON vs. *TOWNSEND.*

Affidavit made before the debt is payable, bad.

Morse had obtained an order to arrest the defendant, on a petition dated the 7th of February, to which was annexed the plaintiff's affidavit, before a notary in New-York, stating that the defendant owed him a sum of money on a note which would become payable on the 13th of February and the affidavit of the plaintiff's agent in New-Orleans, stating his belief of the defendant's intention to remove, &c. under the 22d section of the act of 1807, *chap.* 1.

Alexander for the defendant. The order must be rescinded and the defendant discharged, for the affidavit is insufficient. The plaintiff has made oath at a time when there existed no debt.

By the Court. The oath was made seven days before the note was payable. There is not any fact sworn to which could justify the order to arrest.

ORDER SET ASIDE.

BARRET vs. *BAIL OF LEWIS.*

FALL 1810. First District.

Proceedings against bail stayed, on collusion of plaintiff.

AN action having been brought on several notes of hand originally payable to Jno. Wood & Co. executed by Lewis in Baltimore. The defendant, some time after, was confined for debt, made application to one of the Judges for the benefit of the insolvent law of the state of Maryland, executed a bond for his appearance on a future day to answer the allegations of his creditors, was liberated and came to New-Orleans, where the plaintiff, indorser of said notes, followed him and held him to bail. Lewis returned to Baltimore, in compliance with the condition of his bond: in the mean while judgment was had on the notes, and the plaintiff proceeded against the bail.

A motion was now made to stay the proceedings, supported on an affidavit of Lewis and one of Shepperd, the bail. Lewis deposed that a notice of his intention, to apply for the benefit of the act of insolvency, had been timely served on one of the firm of Jno. Wood & Co. and of the day on which he had been bound to appear and answer the allegations of his creditors. That he had appeared accordingly and the matter had been postponed, from day to day, on the motion of the counsel of the firm, with the consent of the deponent to give his creditors the opportunity of examining his books, papers and transactions in business. That the matter

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being thus delayed till the latter part of the term, the counsel of the firm and that of Atterbury, another of his creditors, filed allegations which imposed upon him the necessity of procuring evidence from New Orleans, so that the consideration of the allegations could not take place during the term and were accordingly postponed till the next. The deponent further made oath of his belief that the allegations were filed with a view to delay him in obtaining his discharge, until judgment could be had against him in New-Orleans: and his bail could be fixed with the debt, and to the declaration of one of the firm of their expectation of saddling the bail with the debt.

Shepperd, the bail, stated in his affidavit the inability of Lewis to pay the debt, that the testimony had been procured and forwarded to Baltimore, and would in the deponent's belief enable Lewis to refute the allegations of his creditors, and that the plaintiff was a partner of Jno. Wood & Company.

Prevost and *J. R. Grymes*, in support of the motion. The collusion between the plaintiff and his partner, in Baltimore, in attempting to prevent Lewis from obtaining his certificate till it would be too late for his bail to plead it in their discharge, in the present action, will no doubt induce the court, if they grant no other relief to suspend the proceedings against the bail, till it

be known whether Lewis will obtain his certificate. The bail is always treated with indulgence, where no injury is thereby done to the plaintiff. 3 *Dallas* 478.

No injury would be done to the plaintiff by a stay of the proceedings, for if the principal was surrendered or in custody upon an execution and afterwards obtained his certificate, the court would discharge him, as they would the bankrupt's property in the hands of the Sheriff. 2 *Strange* 1196. 1 *Bos. and Pull.* 427. 1 *Burr.* 244.

THE principal is priviledged from arrest, in Maryland, in consequence of the Judge's order there and therefore the bail could not take him there untill the proceedings on his application for relief are ended and his final discharge granted or denied, 1 *Bac.* 342, 3 *Dallas* 378.

ALL the plaintiff ought to expect is that the bail may stand as security for the principal's final discharge or surrender. 1 *Strange* 419, 3 *Dallas* 478.

Duncan and *Alexander*, *Contra*. The authorities cited are decisions on the doctrine of bail as known to the common law of England, or regulated by British statutes. The territorial statute gives a remedy, tho' much more summary, bearing a considerable analogy to the English *Sci. fa.* It allows us, on the return of the *non est inventus* after ten days notice, to obtain

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ELMES vs. ESTEVAN.

judgment on motion against the bail, unless good cause be shewn. When at this point we are precisely where bail on a *Sci. fa.* would be when called upon to shew cause. The same cause which could successfully be shewn in England would prevail here, with perhaps the exception of a forced surrender, as our statute contemplates a voluntary one only.

By the Court. Bail is required in this territory for the purpose of securing the plaintiff from the flight of the defendant and for no other purpose. It is the same in England. The court will therefore think themselves justified, if in the attainment of justice, they grant to persons who become bail the same indulgence, which the British Judges have granted, when it does not appear that the indulgence was granted there in pursuance of a statutory clause, which is not to be found in our Code.

THEY protect the bail against collusion. So must we. The case appears sufficiently strong to induce us to give time to the parties to place the whole matter fairly before the court.

PROCEEDINGS STAID.

ELMES vs. *ESTEVAN.*

PENDING the suit, the defendant made a *cessio bonorum*, and the plaintiff proceeded to judgment.

Brown for the Syndics. The judgment is irregular and ought to be set aside. When a debtor cedes his goods to his creditors, the Judge who orders a meeting of the creditors, directs a stay of proceedings. It is therefore irregular to go on to judgment in suits against him. Farther, the cession operates the civil death of the debtor. He cannot consequently remain a party in a suit.

Prevost for the plaintiff. The suit originated by a writ of seizure, which is a proceeding *in rem*. On the cession the premises pass to the creditors *cum onere*. A creditor who has a lien on any part of the estate of his debtor, is not bound to take any notice of an assignment made by the debtor. Whoever has acquired any interest in the premises is sufficiently notified by the seizure, and will on application be admitted to defend the suit.

By the Court. The Judge's order stops all proceedings against the debtor, whether they be carried on against his person, general estate, or any part of it. All proceedings against his person or property are irregular. He becomes by his cession disinterested, in a certain degree. His rights pass to other persons, and cannot be affected by legal proceedings to which the new owners are not parties.

JUDGMENT SET ASIDE.

FALL 1810. First District.

FAKER vs. *HUNT & AL.*

Attachment on the oath of a third person, when bad.

Alexander moved to dissolve an attachment issued on the affidavit of a third person, who did not state himself to be the plaintiff's agent, nor appeared to have any personal knowledge of the claim.

Duncan, contra. The law requires only that the debt be sworn to. In this case, however, the objection comes too late, for the property attached has been bonded.

Alexander for the defendant. It was bonded by the garnishee and likely with a view to obtain relief by shewing the illegality of the process.

By the Court. The Judge who orders the attachment must be satisfied of the justice of the plaintiff's demand. The oath of a person who does not appear to have any knowledge of it, except what he receives from the principal who does not swear, can go but little way to satisfy him. If the process issued improperly, the property might be rightfully obtained by giving bond, without thereby waving any legal objection.

ATTACHMENT DISSOLVED.

JOHN GRIEVE'S CASE.

Proceedings not stayed till schedule filed.

Cessio Bonorum. The Court refused to stay proceedings and appoint provisional syndics, no schedule, accompanying the petition : time being prayed to make one.

MONRO vs. OWNERS OF SHIP BALTIC. FALL 18'0. First District.

Freighter carrying away his goods, discharges the ship.

THIS was an action to recover damages for a stated embezzlement of sundry goods taken out of several boxes, shipped for the plaintiff's account. *Plea*, the general issue.

THE evidence was that after the arrival of the ship, the boxes were landed on the levee and carted to the plaintiff's warehouse. Afterwards some customers attending, one of the boxes was opened to shew them the contents, and a deficiency was discovered. The master of the ship was immediately sent for, and an examination of the boxes took place in his presence: several of the boxes evidently appeared to have been broken in, and a witness examined two or three days after, deposed that when the goods were landing, he had noticed that several ropes round the boxes were broken.

Brown for the defendant. The liability of the master ended, when the goods were received by the clerk, on the levee, and carted away to the warehouse. On the arrival of the ship, the freighter is entitled to the delivery of his goods—he is generally unknown to the master—his cartmen, clerks and servants are still more so. Neither is the master to be accountable for the infidelity of the freighter's agents at the place of shipment. His signature, at the foot of the bill of lading, proves only the general, exterior and ap-

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MONROE *vs.* OWNERS OF THE SHIP BALTIC.

parent quality of the packages receipted for. He is to deliver the goods, as he received them. 1 *Valin, Ord. de la Marine.*

Prevost for the plaintiff. The bill of lading proves that the goods were *shipped in good order and well conditioned.* There is evidence that they were not landed thus. One witness swears the ropes round the boxes appeared broken. The freighter was guilty of no neglect in not examining the contents of the boxes before his clerk took them away : he could not open the boxes, and spread the goods on the levee.

By the Court. The receipt of the goods by the consignee, without any objection made, is conclusive evidence of his being satisfied, that they are in the condition in which they were to be delivered. If the consignee discovers, from the outward appearance of the boxes or bales, that they have been opened, he ought either to refuse to receive them till the contents be examined, or inform the master of his suspicion, and require his attendance, or that of some of the persons in the ship, at the warehouse or other convenient place. But if he takes them away, out of the sight of the master, without saying any thing, and deposits them in such place where he and his agents only have access, he will be precluded, by his absolute and unqualified acceptance of the goods.

JUDGMENT FOR DEFENDANTS.

CASES

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TERRITORY OF ORLEANS.

SPRING TERM—1811—SECOND DISTRICT.

LEWIS vs. *ANDREWS.*

Court cannot try a fact, unless the party has an opportunity of asking for a jury.

Baldwin for the plaintiff, produced the defendant's power of attorney, and moved that the court might, on proof of the execution of it, order judgment to be entered.

By the Court, MARTIN, *J. alone.* It cannot be done. The proof of the execution of the power, is a matter of fact which is properly triable by a jury. The defendant, having had no opportunity of praying for a jury, cannot be said to have waved his right thereto.

MOTION DENIED.

GRAHAM vs. *FORKER & ELAN.*

Leaving petition at a defendant's house, no white person being there is bad.

ONE of the defendants having left the territory upwards of one year, and the process being left at the house in which he last dwelt, there being no white person in the family ;

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POICHE'S HEIRS vs. POYDRAS.

The Court, MARTIN, *J. alone*, held the service was bad.

Butler for the plaintiff, *Turner* for the defendants.

PORCHE'S HEIRS vs. *POYDRAS.* *

Decisory oath cannot be tendered in this territory.

By the Court, MATHEWS, *J. alone.* This action was originally instituted in the Parish Court of Point Coupee on a writing subscribed by the defendant.

IN the course of the proceedings the plaintiffs appealed to the conscience of the defendant, and required him to support his plea of payment by his oath. On his doing so, the Parish Judge gave judgment against the plaintiffs.

THE defendant's counsel contends that this mode of a party being interrogated by his adversary and compelled to answer on oath or refer the oath to his adversary, on the point in dispute, is authorised by the civil law, and that the oath thus taken by one of the parties, called *juramentum decisorium*, is conclusive.

THE oath, according to the principles of the Roman law, can be tendered in two ways: either by the judge, where the scales of evidence being poised, he is permitted to satisfy his conscience by an appeal to that of one of the parties; or

* This case and the following were determined at a preceding term. The opinion of the court is extracted from the minutes.

when one of them tenders it to the other, with a view to the proof of a fact important to the prosecution or defence. But if the fact respecting which the oath is tendered, be immaterial to the success of the party who proposes it, the judge will reject the application.

IF the present suit had been prosecuted according to the rules of practice, which governed the tribunals of this country under the Spanish government, the production of the writing under the signature of the defendant, acknowledged by the pleadings, would have entitled the plaintiffs to an immediate execution, or it would have had the force of a judgment, *aparejada executoria*, in the language of those tribunals.

ON an order of seizure being awarded the defendant might have opposed the proceedings by a plea of payment. In this case the solution of the question, payment or no payment, would have rendered the establishment of the fact of payment a point necessary to the defendant, in his defence only, not at all important to the plaintiffs, in the prosecution of their right. If the defendant, therefore, had refused to answer, nothing could have been taken for confessed or admitted.

IN this view of the case, I think the oath was improperly tendered, and the plaintiffs could not have been compelled to take or refer it—that it is a nullity, and affords no evidence.

BUT, proceeding according to the acts of the

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MAGDELEINE vs. MAYOR.

legislature of this territory, it appears to me the parties cannot give evidence in any suit, except by answer to interrogatories, under the act of 1805, C 6. which virtually repeals all rules relating to the decisory oath.

JUDGMENT FOR THE PLAINTIFFS.

MAGDELEINE vs. MAYOR.

Mother's right to the guardianship.

By the Court. MATHEWS, *J. alone.* The plaintiff demands an account of certain property left to her children by the will of George Olivar, their natural father, contending that she is by law and by the will, tutrix or guardian of her said children, and that therefore, she is the only person entitled to the administration and management of their property, and further, that she has, by the will, an indisputable title to a portion of the property during her life.

THE answer admits the existence of the will, but traverses her right to the guardianship, which she claims under the appointment of the court of probate of Pointe-Coupee.

TWO questions arise, 1st, is the plaintiff by the will or by law, guardian of these children?

2. If she is, could the tutorship be given to another person, to her exclusion?

I. IT appears, on the face of will, that the testator ordered that the plaintiff should remain in possession of the property, to cultivate and

manage it, till the age of majority of her children. It, therefore, may be fairly inferred that although she be not expressly named as guardian, the intention of the testator was that she should act as such.

II. IT appears, by the record produced by the defendant, that he derives the guardianship from the civil commandant of Pointe-Coupee and that he received it in the month of November, 1804, at which time it is very doubtfull, whether any other tribunal, than the superior court sitting at New-Orleans, was competent to appoint to the office, which the Spanish laws, then in force, call a tutor dative, which is not to be given, when there exists a testamentary or legitimate tutor.

THE plaintiff was, therefore, if not expressly by the will, at least by the said law, the tutrix or guardian of her children, and the appointment of the civil commandant is consequently void.

JUDGMENT FOR THE PLAINTIFF.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1811—FIRST DISTRICT.

DURNFORD vs. *CLARK.*

SPRING 1811. First District.

Witness cross examined on a new point.

MOTION for a new trial. During the trial, a witness having been introduced for the plaintiff, was turned over to the defendant's counsel to be cross-examined: The counsel, in interrogating the witness on other matters, drew from him the disclosure of a distinct fact, which had a very material influence in the determination of the cause.

THE plaintiff's counsel objected at the time to the question, put by the opposite counsel, but being overruled by the court, now moved for a new trial, on this ground.

Ellery for the plaintiff. In the case of the *Dean &c. of Eli* vs. *Stewart*, Lord Chancellor Hardwicke said: when at law a witness is introduced to a single point by the plaintiff or defendant, the adverse party may cross-examine to the same individual point, but not to any new mat-

ter: so, in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine as to the same point, but cannot make use of such witness to prove a different fact. 2 *Atkins*, 44.

By the Court, MARTIN, *J. alone.* I have never known this practice to prevail, and I cannot, on this dictum, set the verdict of the jury aside. It must be understood as a rule of discipline, introduced for the purpose of preserving regularity, in the admission of testimony. Every witness must be sworn to tell the whole truth, and if the defendant is not allowed to examine the plaintiff's witness, at first, to any point material to the defence, he has certainly a right to call back the witness and examine him while introducing his own testimony. If, therefore, the defendant's counsel, in the present case, might, at any stage of the trial, have compelled the witness to disclose the fact which has been drawn during the cross-examination, no injury has been done to the plaintiff, by obtaining this part of the evidence, a little earlier than in the regular way.

FARTHER: the witness closed the plaintiff's testimony, and I cannot tell that there was any necessity for the defendant's counsel to dismiss him from the cross-examination and instantly call him as his own witness. *Lex neminem cogit ad* VANA *seu impossibilia.*

MOTION OVERRULED.

SPRING 1811.
First District.

TAYLOR & HOOD vs. *MORGAN.*

Answer to interrogatories extended to a fact, avoiding the debt.

THE Plaintiff in the petition prayed that the defendant might answer whether he had not received the goods, for the amount of which the suit was brought, accompanied with an invoice in which he was charged therewith as a purchaser. The defendant answered in the affirmative, but added, that he had given no order therefor, and that the goods were shipped by order and for the account of a third person.

Depeyster now moved that the latter part of the answer might be striken off, as not called for by the question.

Ellery contra. The testimony of the defendant is called for by the plaintiff; he is therefore, like another witness to tell the *whole* truth, as well what charges, as what discharges, him.

By the Court. This mode of calling for testimony out of the defendant's mouth, established by an act of assembly, may properly be likened to the examination of the party on interrogatories. There is a case in *Ambler* which supports the defendant's position. The plaintiffs, in their examination, admitted the receipt of a parcel of satins from the defendant, and in the same sentence one of them swore he had paid the defendant for them. The master refused to charge the plaintiffs with them. The defendant took the general exception and insisted that the plaintiffs

ought to have proven the avoidance, as they had confessed the receipt. But the chancellor overruled the objection. *Kilpatrick & Thrupp* vs. *Love. Ambler*, 589.

IN the case before this court there is a greater necessity of extending this rule; for the fact that the goods were shipped at the instance and request of the plaintiffs, if it be proven that they were charged to them as purchasers, in the invoice accompanying them, will, perhaps, easily be presumed by the jury, as the fact of their not being ordered by them is a negative fact, which is incapable of any other proof, than the one which accompanies the admission.

THE case in *Ambler* is not a solitary one; the last editor refers in the margin to that of *Talbot* and *Rutledge*, in which the same decision was made.

MOTION OVERRULED.

ASTON vs. *MORGAN.*

Aferamended petition, new answer before issue.

THE plaintiff having obtained leave to amend his petition, and having done so, since the last term, and the defendant having filed no new answer, the cause was set down for trial.

Ellery for the defendant. It was improperly set down for trial, for the parties were not at issue. The plaintiff for want of an answer, might have taken judgment.

SPRING 1811. First District.

ROBINSON vs DRURY.

Smith for the plaintiff. The defendant was not necessarily bound to file a new answer, and if he forebore doing so, the plaintiff might consider the former answer as an answer to the amended petition.

By the Court. When the plaintiff withdraws his petition for amendment, the pleadings, on the return of it, must be made anew, and if the defendant attempts to delay the plaintiff improperly, he is to be quickened by the same means as in the beginning of the suit.

LEAVE TO ANSWER.

ROBINSON vs. *DRURY.*

Defendant by answering waves irregularity in the attachment.

ATTACHMENT levied on a quantity of oil of *palma christi*. The defendant put in an answer.

WHEN the jurors were called to the book, a claim to the oil was put in by a third person.

Depeyster for the defendant, prayed that the jury might not be sworn, because it was going to be proven that the property attached did not belong to the defendant; so that, as he was not properly in, the court could not have jurisdiction of the case.

By the Court, MARTIN, *J. alone.* The defendant, by filing his answer, and putting the cause at issue, has admitted that he was properly brought in, and given jurisdiction to the court.

JURY SWORN.

DAVID vs. *HEIRS.*

SPRING 1811. First District.

Plaintiff cannot proceed to judgment after a cession.

THE defendant, *pendente lite*, became insolvent and obtained a stay of proceedings; no answer being filed the plaintiff took judgment.

Alexander moving to set it a side. Creditors are to take their ranks, according to the dignity of their respective debts, at the declaration of the insolvency. The plaintiff cannot, by any act of his, ripen his debt into a more priviledged one.

Depeyster for the plaintiff As syndics are not yet appointed, the defendant notwithstanding the cession remains the representative of the property ceded. This case differs from *Elmes* vs. *Estevan*, *ante* 192. The stay of proceedings prevents any interference with the person or property of the defendant. Proceeding to judgment is not such as interference. The plaintiff cannot be deprived of the benefit, which his vigilance and industry have fairly acquired.

By the Court. This case cannot be distinguished, from the one cited. No suit can be carried on without *parties.* The defendant was *civiliter mortuus.* The plaintiff was the only party.

JUDGMENT SET ASIDE.

SPRING 1811. First District.

TERRITORY vs. *BARRAN.*

The apparent indorser of a note, admitted to prove the forgery of his name.

INDICTMENT for forgery. Bellechasse, whose signature, as the first endorser of a note, was charged to have been forged, was offered as a witness on the part of the territory. He was asked whether he had a release from the subsequent endorser, and answered in the negative.

Livingston and *Moreau* for the defendant. He cannot be sworn. It is provided by the 33d section of the act of 1805, chap. 50, that the rules of evidence in criminal cases, shall be according to the common law.

A person whose property may be affected by a forgery, is no evidence to prove it upon an indictment. 2. *Hawkins's P. C.* 611.

WHEN a man is indicted for forgery, the party, whose hand is said to be forged, shall not be admitted to prove the fact. For his hand apparently against him is evidence (until the contrary be proved) of an obligation; and, therefore, he shall not be permitted in the indictments, to make proof, while he has an interest in the question (the supposed obligation standing in apparent force against him) that it was not his hand. *Loft's Gilbert* 222, *Buller's N. P.* 288. 1. *Mc Nally* 141.

THE authorities which support this principle are numerous. The British precedents are also supported by American decisions.

IN the case of *the King* vs. *Russel*, the court held that *Gately*, the person whose name was stated to be forged, was an incompetent witness to prove that fact. 1 *Leach C. C.* 10. In that of *the King* vs. *Taylor*, it was determined that the drawer of a bill was not a competent witness to prove that a receipt, endorsed for the value of it, was a forgery. *id.* 225. In the case of *the King* vs. *Boston*, Lord *Ellenborough* said: a prosecutor shall not be allowed to say that a bond purporting to be made by him, was forged. 4 *East*, 582.

THE exceptions, which occur in the books, prove the correctness of the principle. *Dr. Dodd*, having forged a bond, in the name of Lord *Chesterfield*, that nobleman was allowed to prove the forgery, a release having been executed, by the apparent obligees. 1 *Leach C. C.* 185. In the case of *the King* vs. *Akehurst*, the supposed drawer of a note, holding a release from the payor, was admitted as a witness. *id.* 178.

THE courts of the states of New-York, Vermont and Connecticut, haved acted upon this principle.

C. J. *Kent*, in the case of *the People* vs. *Howell*, expressed himself thus: the ancient rule in England that a witness, whose name was forged, was incompetent to prove the forgery on an indictment, because he was interested in the question, still prevails in this court; and it was adopted in 1794. The grounds and reasons of

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that decision are not before the public, and we, therefore, do not known them. It is probable, that the court assumed the English principle, as they found it then existing : but since that time, the question of interest in a witness, has been investigated and defined with more precision, both in England and in this state. The rule now in all such cases, and I believe, I may say in all criminal cases, except in the case of a forged instrument, is that a witness is to be received, if he be not interested, in the event of the suit, so that the verdict could be given in evidence, in an action to which he was a party. 4 *Johnson* 302.

IN the case of the *State* vs. *Bunson*, the supreme court of the state of Connecticut held, that the person, whose name was forged, could not be allowed to prove the forgery. 1 *Root* 307. The same decision was made by the same court, in that of *the State* vs. *Blodget*. *id.* 354.

AND in the state of Vermont, in the case of *the State* vs. *A. W.* 1 *Tyler*. 261.

J. R. Grymes and *Derbigny*, for the territory. In ascertaining what was the principle of the common law, we are not give implicit faith to the crude and undigested ideas of the first law writers, but avail ourselves of the learning and industry of modern ones, and this court is to declare the law, in the same manner as a British court of justice would at this day, unshackled

and unbiassed by any statutory provision, or any decision grounded on a statute.

ALL the decisions which have just now been quoted, are since the statute of 5 Elizabeth. This statute has wrought a considerable difference in the admission of testimony, in cases of forgery, and an examination of the authorities, relied upon by the defendant, will show, that we have not sufficient materials to enable us to discover, that the difference which now exists, in the courts of England, in cases of forgery, is bottomed on the principles of the common law.

Hawkins is first relied upon. This writer does not speak decisively, in the part of his work which is quoted. His expressions are, *I take it to be generally agreed &c.* and he concludes, by informing us that the rules of evidence concerning this matter seem not to be clearly settled. 2 *Hawkins* 611. and Lord *Ellenborough*, in the case cited, recognising the position, as established too firmly to allow any deviation from it, without the authority of parliament, owns his inability to discover upon what principles the anomalous exception from the general rule, in cases of forgery, is grounded. 4 *East*, 582.

THE principle, that a person whose property may be affected, shall not be admitted to prove the fact from which the injury arises, upon an indictment, is far from being universal : and the books are full of cases in which a person, to whose damage, an indictment concludes, has

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been allowed and admitted an evidence, and his credit left to the jury.

IN *Parris's* case, an information being brought against him, for that he, *fraudulenter & deceptive*, procured one Ann Wigmore, to give a warrant to confess judgment, and she being brought forward to prove the cheat, it was debated whether she might be admitted; for if he was convicted, the court would set the judgment aside: nevertheless she was sworn. 1 *Ventris*, 49.

A person beaten, and generally any other person to whose damage a criminal information concludes, is a good evidence to prove the battery or other misdemeanor, notwithstanding he may have an action. 2. *Hawk.* 611.

LORD Holt, in *Regina* vs. *Macartney & al.* admitted a person who had been cheated to prove the fact on the indictment. 1 *Salkeld*, 286. 6 *Mod.* 391. 2 *Ld. Ray.* 1179.

IF a woman give a bond or note to a man to procure her the love of J. I. by some spell or charm, in an indictment for the cheat, tho' it tend to avoid the note, yet she shall be a witness. *Per Holt. C. J. Regina* vs. *Sewell*, 7 *Mod.* 119.

THE proprietor of a note was admitted to prove the tearing of it by the maker, on an indictment. *King* vs. *Moyse*, 1 *Strange*, 595.

SIR William Lee allowed a party, supposed to be defrauded to be witness on an indictment for perjury. 2 *Strange*, 229. *Rex* vs. *Broughton.*

IN *Abrahams qui tam* vs. *Bunn*, Lord Mans, field held that the borrower of money, was a competent witness to prove both the usurious contract and the payment of the money. 4 *Burr.* 2251.

HAVING established that the admission of Bellechasse is not contrary to the general principle; it remains to shew that the particular exception, which is said to prevail in Great Britain in cases of forgery, is not absolutely recognised in the American courts.

IN the case of Hutchinson, the Superior Court of the state of Massachusetts said, that although they believed it to be now settled in England that the person, whose name is said to be forged, is not a competent witness to prove the forgery, yet the practice had been for a long time, otherwise, in that state. *Mass. R.* 8.

IN the case of one Keating, tried in Pennsylvania, Meng, the person whose hand was stated to be forged to a note, was admitted to prove the forgery. *C. J. M'Kean*, citing several cases in which it had been thus determined. 1 *Dallas*, 110.

IN Ross's case, in the same court, Heister, the apparent maker of the note stated to be forged, was allowed to prove the forgery. The Chief Justice saying: I admit that early in life I entertained a different opinion on this point: conceiving then, that the weight of adjudged cases was adverse to the competency of the witness, tho' I thought it hard that the law should be so. My

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opinion has been changed by the modern authorities, which give an evident preponderance to the opposite scale. In general, the judges of late have been inclined to a more liberal admission of testimony, applying exceptions rather to the credit than to the competency of witnesses.—Every principle of policy must enforce the necessity of allowing the person whose name is said to be forged to give evidence of the fact. 2 *Dallas*, 240.

By the Court. The general principle of the common law, in regard to the inadmissibility of a witness on account of interest in the event of the suit, is now clearly understood. It is confined to such cases in which the verdict may be given in evidence in a suit brought for or against the witness. In other cases, the objection is said to go to his credibility only. In this manner, is the law now understood in England and the United States.

IT cannot, however, be denied, that in indictments for forgery, a different rule prevails in the former, and in some of the latter, country. One which forms a wide exception. In some of these states, in which the proceedings are according to the common law, however, the exception does not seem to have been received.

IN examining the cases cited and those to which we are able to have acess, it does not appear that the exception was admitted before the reign of Elizabeth, in the fifth year of which was passed

the statute, on which most indictments for forgery are brought; and British writers seem to admit that the exception is, at least in a considerable degree, bottomed on some of the provisions of that statute.

THE exception cannot be traced to the common law. Cases for forgery, in which the person whose hand was charged to be forged, might be brought to disprove it, must have been very rare. Three kinds of instruments only were the subject of forgery: records, wills, and deeds. The former depended on the evidence of uninterested persons generally. In the case of a will, the testator could not be offered to prove the instrument. The efficacy of deeds depended on the *sealing* and *delivery*, not on the signature of the grantor. Indeed, they were not, it is believed, signed by him.

THE general rule is certainly binding upon the court, in all cases in which the exception has not the same force. According to it the witness is not to be rejected, and his credibility is to be weighed by the jury.

THE exception is bottomed on decisions, all of which appear made since the statute of Elizabeth. It does not appear that it existed at common law. The courts of Pennsylvania and Massachusetts, who were not authorised to reject it by statute, support us in saying so.

WITNESS SWORN.

THE defendant's counsel offered a witness to prove that the defendant had himself given in-

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formation of the forgery to a justice of the peace, in order that a prosecution might be instituted: but the court, after hearing argument, declared the testimony inadmissible saying; a man could not fabricate evidence for himself.

THE jury not agreing on a verdict, a mistrial took place by consent, and the governor ordered a *nolle prosequi* to be entered.

TERRITORY vs. *M'FARLANE.*

Bail denied on indictment for murder.

THE defendant, being charged with murder, was brought before one of the judges of this court at his chambers, who thinking the presumption of his guilt but slight, was willing to bail him. It being late in the night, the defendant found it impossible to procure bail and was committed. At the opening of the court on the next day, the grand jury brought in a bill of indictment, charging the defendant with murder. He prayed to be admited to bail. His motion was opposed by the attorney general, who relied on the case of *the Territory* vs. *Benoit*, *ante*, p. 142.

Ellery, in support of the motion. This court, being the superior court of the territory, and having common law jurisdiction, has necessarily the same power as the Court of King's Bench in England.

THE Court of King's Bench may, *virtute offi-*

cii bail any person brought before them, of what nature soever the crime is, even for treason or *murder*. 2. *Hale's P. C.* 148. And this bailment may be upon *original indictment* before them in the county where they sit, or upon *indictment removed* by *certiorari*, or upon a prisoner removed by *Habeas Corpus*, before or after indictment taken. *id.* 129.

By the Court. When the grand jury find a bill for a capital offence, the party charged lies, from the finding alone, under such a violent suspicion of guilt, that the court will instantly commit him, if he be present, or direct a capias against him ; and as the trial, in the ordinary course, is not long delayed, it is the practice of the court not to lend its ear to a motion for bail.

THIS is the general rule. We will not say that it may not have its exceptions. As, if the party, charged to have been murdered, were to make his appearance in court.

IN case of a mistrial or of a continuance, at the instance of the territory, as the confinement may be extended to a considerable length, there would be no impropriety in listening to a motion to bail ; but when the attorney-general is ready for trial, the court, except in a very extraordinary case, will not admit the application.

BUT in all these cases the bailing is in the discretion of the court, and none can challenge it *de jure*. *Hale's P. C. loco citato.*

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BY the ordinance of Congress which is the constitution of this territory, bail is to be taken, unless for capital offences where the proof shall be evident or the *presumption great.* *Art.* 2.

IN the present case there are circumstances which seem to preclude the defendant from the indulgence he requests. It appears one McBride was beaten with a stick by one Byrns, of which beating he afterwards died, and that the defendants tood by, encouraging Byrns to beat the deceased well.—That Byrns and the defendant were gamblers, and the deceased had given such information to a magistrate, upon which they had been arrested. It did not appear whether Byrns' anger proceeded from any outrageous behaviour of the deceased on an encounter, or from an irritation excited in him and the defendant, by the prosecution which the deceased had provoked. Now the grand jury have brought bills against Byrns and the defendant, charging them with murder.

THE defendant has clearly, and from his own admission, participated at least, in an aggravated battery, from which death has ensued. If his offence is reduced by the petit jury to manslaughter or battery, the court will, in fixing the time of his imprisonment, give him the benefit of any extenuating circumstances which may appear at the trial.

THE rule laid down, in *Benoit's* case, is, it is

believed, a correct one. It will not, however, be rigidly extended, to cases in which the defendant has not the benefit of a trial, during the term, in which the indictment is found, when the continuance is not granted, at his solicitation.

MOTION OVERRULED.

PERETZ vs. *PERETZ & AL.*

Maker and indorser suable jointly.

THE defendants were the maker and endorser of a note of hand, and the plaintiff the last endorser.

Ellery for the defendant. A joint suit was improperly brought, the defendants' obligations are several, and arose at different periods; that of the maker is absolute, and that of the endorser, conditional. The remedy must be of the same nature as the cause of action. The one cannot be joint, when the other is several.

Fromentin for the plaintiff. That is the rule of the common law of England. It prevails, perhaps, in such of the United States, in which the law and equity jurisdiction is divided, and there in courts of law only. The Spanish law, following the principles of the civil, gives the action *contra todos y cada uno.* 3 *Febrero*, 405. *n.* 13.

By the Court. The suit is rightly brought.

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SYNDICS OF McCULLOUGH vs. FANCHONETE.

The Spanish authority, cited by the plaintiff's counsel, fully supports him. The rule is the same in the courts of equity in the United States and in the court of chancery in England, in which the practice is according to the rules of the civil law. If a debt be joint and several, each of the debtors must be brought before the court. *Madox* vs. *Jackson*, 3 *Atkins*, 406. All concerned in the demand ought to be made parties. 2 *Ventris*, 348.

ACTION SUSTAINED.

SYNDICS OF McCULLOUGH vs. *FANCHONETTE.*

Judgment against the holder of sequestered property, not cited, set a side.

A writ of sequestration being prayed for and obtained, a copy of the petition was left at the domicil of the person who held the property, without a citation. Judgment by default, being taken against him, the court, on the motion of *Depeyster*, sat it aside : saying that no judgment could be taken against a man who was not cited to appear.

Hennen for the plaintiffs.

M'FARLANE vs. *RENAUD.*

Seven judicial days allowed to move for a new trial.

IN this cause, it was determined that the seven days, allowed by the act of 1805, Chap. 16, to move, for a new trial, are to be court days. The two Sundays and the fourth of July, on which

the court did not sit, were therefore excluded.

J. R. Grymes for the plaintiff and *Duncan* for the defendant.

TERRITORY vs. *McFARLANE.*

By the Court. The prisoner has been found guilty of murder of the second degree, and we are now moved to arrest the judgment on the following grounds:

The caption is not a part of the indictment

The words *vi et armis*, not necessary in an indictment for murder.

1st. That the caption does not contain the day or term on which the indictment was found.

2. That the words *vi et armis* are not in the indictment.

3. That the indictment is inconsistent and repugnant.

4. That the offence is not described in the words of the statute.

I. In support of the first ground, the counsel for the prisoner has cited 2 *Hawkins*, 362. *c.* 35, *s.* 127. "The caption must set forth a certain day and year, when the Court was holden."

WE are of opinion that the caption, of which *Hawkins* speaks here, makes no part of the indictment. The caption is the inception of the record, both in civil and criminal suits; it is that part of it which precedes the declaration or indictment.

Hawkins and *Bacon* after him, so consider the

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caption and the indictment : for they treat of the former separately, and after having treated of the latter. And *Blackstone*, in the record, in the appendix to the last volume of the commentaries, clearly distinguishes the indictment from the caption.

Hawkins cites as a necessary, nay essential, part of the caption, that it should contain the name sof the jurors, or at least it should expressly appear that they were at least twelve in number : circumstances which are never found in any form of indictment.

Foster also impliedly admits that the caption and indictment are distinct things : for he informs us that the prisoner is to be furnished with copies of both. *Foster's C. L.* 229.

SIR *Mathew Hale* puts this question, however, out of all doubt. Touching the forms of indictments, says he, there are two things considerable : 1st, the caption of the indictment : 2d, the indictment itself.

THE caption of the indictment, is no part of the indictment itself; but it is the style or preamble on the return that is made from an inferior to a superior court from whence a certiorari issues to remove : or when the whole record is made up in form. Whereas the record of the indictment, as it stands upon the file in the court, wherein it is taken, is only thus : *Juratores pro domino rege &c.* When it comes to be return-

ed upon a certiorari, it is more full and explicit, *Norff. Ad generalem sessionem &c.* 2 *Hale's P. C.* 65.

II. THE omission of the words *vi et armis* is the second ground. The counsel rely on 2 *Hale*, 187. "In all indictments for felony, there must be *felonice*, so it must be laid to be done *vi et armis*, at common law. He cites *Stamf. P. C.* 94. *a.*

Hawkins does not speak in so unqualified a manner. "It is taken for granted in some books, "that they, (these words) were necessary at "common law, in all indictments for offences "which amount to an actual breach of the peace, "as rescouses, assaults and the like: yet I do not "find that they were ever necessary in such in-"dictments, wherein it would seem absurd to "put them in, as in indictments for conspira-"cies, cheats, slander and such like, or nui-"sances committed in a man's own ground. 2 *Hawkins.* 343 *s.* 90.

THESE words, however, are no longer held necessary, according to most English writers, since the statute of 37 *H.* 8 *c.* 8. The preamble of this statute recites that "in all indictments of "felony and trespass, and divers others, it was "common to declare the manner of the force and "arms, that is to say, *vi et armis*, viz, *baculis* "*arcubus et sagittis*, or other such like words; "where in truth the parties had no such weapons "at the time of the offence, yet for lack of such

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"words, the said indictments were taken as "void, and had been avoided by writ of error "and plea, &c." The statute then proceeds to declare these words unessential.

IT is to be observed that the statute informs us, that the insertion of these words was *common*, not *universal*.

SINCE the statute, lawyers have been found who contend, and courts have often determined, that the statute in the enacting part, did not refer to the words *vi et armis*, but only to those which follow, viz, *baculis, sagittis et arcubus*, or such like, which *declare the* MANNER *of the force and arms*, and that the omission of the words *vi et armis*, is not helped by the statute. 2 *Hawk. P. C.* 94. 2 *Levinz*, 261. 1 *Siderfine*, 140. 1 *Bulstrode*, 205. 1 *Levinz*, 206. 1 *Keble*, 101. 2 *Keble*, 154. *Popham*, 206. Yet among some of these, the opinion prevails, that neither at common law nor at present, were the words *vi et armis* essential, where they are implied by others as *rescussit ro manu forti*. *Croke J.* 345. 2 *Bulstr.* 208. In an indictment for a riot the words *vi et armis* are implied in the words *riotose cesserunt, fregerunt, prostraverunt*. 2 *Hawkins*, 344 *c.* 25 *sec.* 91. in margin. 2 *Strange*, 834.

IT has been adjudged that the words *vi et armis*, are not necessary in an appeal of death, because they are so fully implied. *Smith* and *Boden*, *Mich* 7. *Ann.* 8. tho' if the killing were with a

weapon, the count must shew with what particular weapon; and if it were not by any weapon, but by some other means, as by poisoning, drowning, suffocating, or the like, the circumstances of the fact must be set forth, as specially as the nature of it will admit.

IN the present case, the indictment describing the weapon, with which the mortal wound was given, we think *the manner of the force and arms*, being *particularly* declared, it was not necessary that the *force and arms*, should be *generally* expressed. *Vi et armis* implied in murder. 1 *East* 346.

III. As to the repugnancy. The indictment sets forth, that the prisoner and one Byrns, on the 6th of April, assaulted the deceased, that Byrns gave the mortal blow, that the deceased languished till the 10th, when he died, that the prisoner was then and there abetting Byrns, and concludes that the prisoner and Byrns murdered the deceased.

IT is contended that there is here a fatal repugnancy. The words, then and there, referring to neither of the periods previously mentioned in particular: and if the reference is to be made according to the ordinary rule of the construction, to the last antecedent, it relates to the time of the death, and not to that of the stroke.

Hawkins is again invoked. "An indictment "of death, laying the stroke at *A.* and the death

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" at *B.* or the stroke on the 1st of May, and " the death on the 10th, is insufficient for the re- " pugnancy.....because it supposes the murder to " have been committed at a place in the first " case and on a day in the second, in which it ap- " pears, by the indictment itself, that the party " was not killed, but only wounded." 2 *Hawk. P. C.* 325 *c.* 25. *s.* 62.

IF in the present case, instead of the words *then and there*, the words *on the 6th of April*, had been substituted, the cases would have been parallel. But we find one similar to that of the prisoner, in 2 *Hawkins*, 264. *c.* 23 *s.* 89.

" WHERE it is alledged that the principal such " a day, made the assault and gave the stroke " and that the party died on such a subsequent " day, and that *A. B.* was *adtunc et ibidem abet-* " *tans*.....the words *adtunc et ibidem*, from the " manifest import of the whole, shall be refer- " red to the time of the stroke.....Yet, if *A. B.* " had been said to have been present, at the time " of the felony and murder aforesaid, viz: on " the day of the stroke, *tunc et ibidem*, abetting, " &c. it seems the appeal would be insufficient, " as to *A. B.* for the repugnancy."

IN the indictment under our consideration, the words, *then and there*, are not confined by any subsequent expression, to either of the antece- dent periods, so as to prevent their being ex- tended to both, and thus avoid the rupugnancy.

IT does not appear to us that, even if the repugnancy existed, the part in which it is found, would necessarily be deemed material. The indictment begins by stating the joint felonious assault, refers to the mortal wound by one of the parties, the death, and finally charges both with murder, so that the clause, stating the presence of the prisoner specifically, is an useless one.

IV. IT is objected that the indictment is insufficient in as much as it does not describe the offence in the words of the statute.

THE indictment in this particular, is worded according to the common law forms, with the proper conclusion in statutory offences.

THE first section of our act of May, 1805. *c.* 50, provides the punishment of death for the crime of *wilful murder*, the 22d section that of a fine and imprisonment at hard labour for that of *manslaughter*.

THE act of July, 1805. *c.* 4. provides, "that "all murder which shall be perpetrated by "means of poison, or by laying in wait, or by any "other kind of wilful, deliberate or premeditated killing, or which shall be committed in "the perpetration, or attempt to perpetrate, any "arson, robbery, or burglary, shall be deemed "murder of the first degree, and all other kinds "of murder, shall be deemed murder of the second degree.....and the jury shall ascertain in "their verdict, whether it be murder of the first "or second degree."

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Stackhouse & al vs. Foley's Syndics.

Murder of the first degree is punished with death, and murder of the second degree, with imprisonment at hard labour.

In this case, the jury found the prisoner, not guilty of murder of the first degree, but guilty of murder of the second degree.

Murder of the second degree is any kind of murder not enumerated in the first part of the section. The indictment charges the prisoner with wilful murder, with malice aforethought. Perhaps if it had simply charged him with murder, his counsel could not have successfully resisted the motion of the attorney general for judgment of imprisonment at hard labour.

Motion Overruled.

STACKHOUSE & AL. vs. *FOLEY'S SYNDICS.*

Vendor, who sells for a note, retains his lien in case of bankruptcy, but loses it, if the goods sold be altered, as wine by mixture.

The plaintiffs, shortly before the bankrupt's failure, had sold him six pipes of wine, for which they had taken his note. On his making a *cessio bonorum*, and obtaining a stay of proceedings, the plaintiffs applied for a writ of sequestration against the wine, which was executed on five of the six pipes. Two of them were untouched, but from each of the three others, one third of the wine had been drawn, and an equal quantity of wine of another quality, substituted, with the view to the improvement of the liquor.

Alexander for the syndics. The plaintiffs are

not entitled to the wine, for they have received that payment which was stipulated for, at the time of the contract. They must, for the amount of their note, come in as other creditors. 1 *Evan's Pothier* 381, *note a.* *Kearslake* vs. *Morgan.* 5 *T. R.* 513. *Louvier* vs. *Lawbray* 10 *Mod.* 36.

THE three pipes, from which a part of the original wine has been drawn, and in which other wine has been put, cannot be considered as the merchandize sold by the plaintiffs, if it be admitted that the note was no payment.

Hennen for the plaintiffs. The bankrupt's note, cannot be considered as a payment, either on the principles of the common law, or the commercial laws. *Tipley* vs. *Martens*, 8. *T. R.* 451. 5 *Comyn's Digest by Rose* 96. 1 *Wilson's Bacon's Abridg't* 286. *Owenton* vs. *Morse.* 7, *T. R.* 64. *Ord. Bilb. cap.* 17. *n.* 37. *Gould's Espinasse part* 1, 130. *Murray* vs. *Gouverneur and others, in error.* 2 *Johnson's* cases, 438.

NAY, if there were evidence of its being accepted, as absolute payment, the contract being at the eve of a bankruptcy, it would be presumed that the bankrupt was aware of the approaching catastrophe, and the note would then be considered as a piece of waste paper. For when one gave the note of a third person in payment, and the vendor took it absolutely as a payment, yet it being shown, that the party giving the note, knew the third person to be in failing circumstances,

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on the failure, the court considered the note as no payment. *Popley* vs. *Ashley*, *Holt* 122.

STACKHOUSE & AL. *vs.* FOLEY'S SYNDICS.

WITH regard to the three pipes, part of the contents of which has been drawn off, the whole mass must take its character from the nature of the greater part. The wine which has been substituted, has lost its character by confusion. In determining so, no injury will be done to the mass of creditors, for the wine drawn off, will be presumed to be a fair compensation for that which has been put in.

By the Court. The ordinance of *Bilbao* must determine this case. The 37th section of it, provides that, "if a seller of merchandize take "in payment a bill, becoming due within a cer- "tain time, within which the purchaser of the "goods, the drawer or indorser should become "insolvent, it is ordained that if the merchandize "be found in the possession of the insolvent..... "and the whole or part of said bill be not paid, "a quantity proportioned to the sum unpaid, "shall be delivered up to the bill holder."

THERE can therefore be no doubt, that the plaintiffs are entitled to the two pipes, in the contents of which there has been no alteration.

WITH regard to the other three, we consider that the seller's privilege, ought not to be extended to them. It is an odious one, as it destroys that equality, which alone is equity. Commercial misfortunes cannot be averted by law,

it can, however, lessen their consequences by dividing them. These three pipes are, therefore, to go to the common stock, and the plaintiffs, as to their value, come in for a dividend, as ordinary creditors, and not as creditors upon lien.

SEGUR vs. *SYNDICS OF ST. MAXENT.*

Gayoso's line, near New Orleans recognised.

THE plaintiff claimed a deduction from the price of a plantation, part of which had been taken by the Spanish government.

IT appeared in evidence that in October 1776. Madam de Mauleon, had sold to Gilbert de St. Maxent, a plantation of seven arpents and eighteen toises, front on the river, bounded on one of the sides by a pallissadoe, which enclosed the city of New-Orleans.

THAT in August 1789, St. Maxent sold the premises to the plaintiff for $ 72,000.

THAT in 1794, the Spanish governor surrounded the city with new fortifications, which in some parts, took in ground which was not covered by the original fortifications, under the French government, while in others, they left out ground, which the old fortifications had occupied.

THAT the plaintiff having laid his claim for an indemnification, the Spanish governor, on the 4th of November 1797, had rejected it on the ground, that "neither the plaintiff nor the per-

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" sons from whom he held, could have acquired " any right on the ground within the lines of " the old fortifications, altho' thro' error, inat- " tention, or indulgence they might have been " suffered to possess it : that, with regard to the " angles of fort St. Charles, which might ex- " ceed the old fortifications, the plaintiff could " not have a better title to an indemnity from " government : because, in all concessions made " under the French government, the king had al- " ways reserved the right of taking out of the " lands granted, the ground necessary, for ex- " tending the fortifications of the city : a right " to which the king of Spain had succeeded."

THAT St. Maxent having died in the mean- while, the plaintiff, in the year 1798, brought a suit against his estate, in order to obtain a de- cree authorising the plaintiff, to retain out of the part of the purchase money, which still remain- ed due, a sum sufficient to indemnify him, for the ground he had lost.

THAT in June, 1800, the Spanish tribunal, or- dered a valuation of the land sold by St. Maxent, beyond that sold him by Madam de Maulcon, " which" says the decree, "did not belong to him, " and for the possession of which he had no " title." *No eran suyas, careciendo de titulo que autorisase la detencion en que se hallaba.*

THAT after the valuation, the Spanish tribu- nal granted to the plaintiff, in February, 1801,

an indemnity of $ 25,557, the reported value at the time of sale, of 21 square arpents, covered by the old fortifications.

THAT before the final determination of the suit, the officers of the king of Spain discovered a declaration of Villars Dubreuil, made on the 17th of November, 1758, while the premises were selling, at public auction, whereby Dubreuil acknowledged that, "out of the seven "arpents and eighteen toises, which the planta- "tion was said to contain, there were two ar- "pents and twelve toises, which belonged to "the king, and that it was only, out of consi- "deration for Mons. Dubreuil, that the king "had consented that he should occupy them, and "erect buildings thereon, and that the same were "selling, and as such would be, in the hands of "the purchaser, liable to be resumed by the "king, at the will of his representative, who "would allow the removal of any building or "improvement."

THE following extract of the proces verbal of the sale and adjudication, was read, "where- "as the greatest part of the buildings of the "plantation are erected on a piece of ground, "which belongs to the king, and which H. M. "has reserved for his use, and is not compre- "hended, in the said seven arpents and eighteen "toises, on the river, we have caused it to be "loudly proclaimed, that it should be lawful, for

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"the king, to resume the said ground, belonging to H. M whenever he may see fit: the purchaser remaining at liberty to remove every building or improvement thereon."

THAT in consequence of this declaration, Don Gayoso de Lemos, governor of the province, in the month of November, 1798, resumed this ground, causing a line to be drawn, at the distance of two arpents and twelve toises, in length, from the angle of the barracks and parallel to the last squares of the city, whereby the plaintiff lost a portion of his land, besides that for which he was indemnified by the decree of the 25th of February, 1801; wherefore he brought his claim before the Spanish tribunal, on the 3d of January, 1802, with a view to obtain an indemnification for the land thus taken from him, and which lies between Gayoso's line, and that of the French fortifications, which is the object of the present suit.

Brown for the defendant. The piece of ground, mentioned in Dubreuil's declaration and the proces-verbal, was only of the extent of two arpents and twelve toises, in superficies; not of front on the river, according to Gayoso's reckoning.

Derbigny for the plaintiff. In the settlement of this country, lands were reckoned by the extent of their front on the river, with the usual

depth of forty acres. Concessions were uniformly granted in that manner.

THE declaration of Dubreuil, under whom, the defendant's title accrues, "that out of the "seven arpents and eighteen toises, which the "plantation was said to contain, there were two "arpents and twelve toises, which belonged to "the king," is conclusive evidence. For Dubreuil makes no distinction, speaks of arpents absolutely, when he describes the extent of the plantation and that of the king's ground. *Verba fortius accipiuntur contra proferentem.*

THE question, if any doubt was entertained, must have been considered by Gayoso. His decision was not complained of: it cannot be considered as an unauthorised stretch of authority.

By the Court, MARTIN, *J. alone.* The land was bought by St. Maxent, with the reservation of the king's right, to a certain part of it. According to the laws of the country, no suit was necessary to ascertain the royal portion. It was laid off according to the known rule and usage, and the governor's construction is warranted by the cotemporaneous exposition of the word arpents, in grants and concessions of those days; if superficial arpents were meant, it would have been necessary to have described the particular spot, with more accuracy, than by saying, the ground on which the buildings stood. The decision

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does not appear incorrect, and it was made by the only legitimate authority at the time, tho' doubtless it was liable to the revision of the sovereign. The parties seem to have been satisfied therewith; and the plaintiff, having lost part of the purchased land, by a legal determination, is entitled to compensation.

JUDGMENT FOR THE PLAINTIFF.

URQUHARTS vs *ROBINSON.*

An invoice accompanying the goods, is no evidence against the master of the ship.

By the Court. This is a motion for a new trial, on the ground of the rejection of proper evidence.

THE plaintiffs received by the vessel, of which the defendant is master, a quantity of goods. Their clerk took notice, on the landing, that two of the boxes had been opened, and calling the attention of the defendant to this circumstance, the contents of the boxes were ascertained with him. A suit was brought to recover damages for the deficiency, and at the trial, the plaintiffs' counsel offered as evidence of the contents of the boxes, at the time of the shipment, an invoice which the defendant's counsel admitted, had been inclosed in a letter which came with the goods. The court, being of opinion that it was not proper evidence, and the plaintiffs having no other, nominal damages only were given: and we are requested to reconsider the opinion which excluded the letter.

IN doing so, we have been induced, rather by a desire to correct a popular error, which prevails here, than from the idea that the question is attended with any difficulty.

IN every case, the plaintiff must, not only prove the breach of contract or injury upon which his cause of action arises, but also, the amount of the damage, or the extent of the injury which he has sustained: and both must be proven by *legal* testimony.

IN the present case, the plaintiffs have proven the breach of the defendant's contract, in failing to deliver the goods, shipped in good order and well conditioned, *in the like order*, since they have proved the boxes were broken. This entitles them to damages. But it remained for them to shew the *amount* of these damages, the extent of the injury the defendant has done them. This amount was the quantity of the goods *not delivered* or their value: and this they were bound to do by *legal* evidence.

THEY have shewn what remained in the boxes; to ascertain the deficiency, they have attempted to shew what goods were in the boxes, at the time of the shipment, by producing the invoice transmitted by the shipper.

THIS invoice, the defendant has contended, could not be received:

1. Because it could not bind the defendant, as an instrument of writing or a written contract.

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2. Because it could not be received as the evidence or testimony of the shipper.

I Men are only bound by the contracts to which they are parties; by the instruments of writing which they subscribe, or to the confection of which they concur, or which they afterwards acknowledge.

THE defendant was not a party to any contract resulting from this invoice. It was not subscribed by him; he did not concur to the confection of it; neither, has he ever acknowledged its correctness.

THE invoice has therefore, no binding force in regard to the defendant. It is not to be read, as the evidence of a contract.

II. It remains for us to inquire whether it can be read as the evidence, or testimony of the shipper: and this the defendant's counsel, has contended cannot be done, because, it is not regularly taken: because, if it were, it could not be read, the shipper of the goods having an interest to charge the master, in order that he may thereby discharge himself.

THE testimony is not regularly taken, because, it is not under oath—because, it was taken *ex parte*.

Testis injuratus fidem non facit, says the code *lib. 4. tit. 20 de jur jurando; in notis.*

EVERY witness before he is examined must be *sworn. Esp. N. P. 128. Ley 81. tit. 16. Part. 3. cerca del fin. cap. de testibus et ibi gloss. hoc tit.*

EVIDENCE must be given in the presence of the party against whom it is to be used. For where the jury having withdrawn, called back one of the witnesses, who repeated his evidence, altho' the evidence was the same, that had been given before, *et non alia nec diversa*, their verdict was set aside.

Neither can, an argument be drawn *ab inconvenienti* from the difficulty of sending across the Ocean, to procure testimony. Till the 26th of George the third, bonds executed in the East-Indies, could not be proved without being sent thither, if the subscribing witness resided there. In that year, a statute was made, making an exception to the general rule.

IN *Coghlan* vs. *Williamson*, the hand writing of Steele the subscribing witness, who resided in the West-Indies, to a bond, was not allowed to be proven, till it was established, that the defendant had declared, that the plaintiff could not recover, for the bond was executed on ship board, and that he could not get the witness: thus acknowledging impliedly the execution of the bond. *Douglas* 93.

LASTLY, the shipper's testimony is said to be objectionable, for if the goods were not put in the boxes or taken out of them, before the shipment, he would be discharged, if the plaintiffs were to recover from the defendant: as they could not have two compensations.

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However, on the ground of the paper not being *sworn to*, it was impossible to receive it as evidence.

In the case of *Riche* and *Richard* vs. *Broadsell*, determined before the revolution, in Pennsylvania, a different opinion was given, and an account of sales unsworn to, was admitted: the court saying the strict rules of evidence, were not to be extended to mercantile cases. But this is a solitary case which, being contrary to every precedent and principle, cannot be received by us as evidence of the law. For if the rule which requires that testimony should be *on oath*, that which demands that it should be taken *in presence of the party*, against whom it is to be used, and that which repels an *interested witness*, be *strict rules*, which may be disregarded in mercantile cases, it will follow, that the court have no rule in these cases, but the will or whim of the judges.

MOTION OVERRULED.

Duncan for the plaintiffs. *J. R. Grymes* for the defendant.

DEBON, CURATOR &c. vs. *BACHE & AL.* *Ante* 160.

Transfer of property, in fraud of the insolvent's creditors, void.

By the Court. The Spanish authorities cited support the plaintiff. This was not a payment, in the ordinary course of business, but a transfer of property, uncalled for by the defendants who, tho' they pressed for the payment, appeared to

have no notice of their debtor's circumstances, till the receipt of the instrument intended to vest the property in them, and therefore, cannot be presumed to have solicited the assignment—This, therefore, was a deliberate disposal of property, after the transferor had become insolvent, with a view of giving the transferees an undue advantage over the other creditors, and is consequently a fraud on them, and void.

JUDGMENT FOR THE PLAINTIFFS.

RAMOZAY & AL. vs. *THE MAYOR &c. OF NEW-ORLEANS.*

Whether the Corporation may cumulate licenses for retailing liquors, billiard-tables and boarding-houses?

CONDICTIO INDEBITI. The plaintiffs were keepers of grog-shops, and for several years past, had paid the sum of one hundred dollars each, into the treasury of the city, for a license to retail liquors by the small measure, keep a billiard table and a boarding-house or tavern. By consent of the defendants, they joined in a suit, to recover back the greatest part of the money thus paid, on the ground that this general license had been forced upon them, the officers of the Mayoralty, having made it a rule not to grant licenses for retailing liquors only, and to grant only licenses for the cumulated objects of retailing liquors, keeping a billiard table, and an hotel, tavern or boarding-house.

THE above rule was admitted by the defen-

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dants' counsel, to have been that which governed the conduct of the officers of the Mayoralty, but there was no evidence that any of the defendants had made application for a license, for the sole object of retailing liquors. Their licenses were not produced, nor evidence given of the contents of any of them in particular, but the books of the mayoralty, which were produced by consent, shewed that the defendants were entered as holders of a license for the three objects.

Livingston for the plaintiffs. The defendants contend that they have a right to receive this sum

1. By the powers vested in them by the charter of 1805 :

2. By those conferred on the cabildo, under the Spanish government and confirmed by the charter of 1805.

I. What are the original powers conferred by the charter of 1805, as applicable to this subject ?

"COUNCIL shall have powers to pass bye-laws, " for the better government of the affairs of the " corporation, for regulating the police and pre- " serving the peace and good order of the city : " provided that no such bye-law be contrary to " the *charter*, to the *constitution of the U. S.* or " the *laws of the Territory*.—They shall have " power to raise by tax, in such manner as they " shall deem proper, upon the *real* and *personal*

" *estate*, within the said city, such sum as may " be necessary for lighting, paving, &c.

" Provided that the said Mayor, &c. shall not " have power to regulate the price of any other " provisions than bread, or the price of mer- " chandize brought or imported into the said " city.—Nor to tax *butchers* or *bakers*, nor *carts* " nor *drays*, otherwise than for the licenses " herein after provided for.

"The Mayor shall licence all taverns and board- " ing-houses, hackney coaches, carts and drays, " *subject to such restrictions*, as the Mayor and " City Council shall *by ordinance* direct. And " the Mayor shall be entitled to receive for every " license, the sum of two dollars and an half." *Act of February* 17, 1805, *ch.* 12. *sec.* 6 *and* 11.

THIS charter, like all other statutes in derogation of general law, erecting new jurisdictions and vesting new powers, ought to be *strictly* construed.

THIS power, to wit: that of taxing, being one of the attributes of sovereignty, shall not be presumed to be granted, but by express words and shall never be enlarged by construction—Thus in the present instance, a power is given to *tax*, but it shall be strictly confined to the objects expressly designated, viz: *real* and *personal estate*. A power is given to take two dollars and an half, for a license; it shall not go beyond that sum.

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THE council are authorised to make "bye-"laws, for the better government of the affairs "of the corporation, for *regulating the police* and "*preserving peace* and *good order*." Their bye-laws must have no other objects, nor will these general expressions authorise an imposition *ad libitum* on taverns or any other profession or calling, more especially as the means of obtaining a revenue to carry these objects into effect, are pointed out in the charter by *tax* on *real* and *personal estate.*

THE expression used in the clause giving power to the Mayor to license, "subject to *such* "*restrictions* as the Mayor and city council, shall "*by ordinance* direct," evidently relates to the restriction of number, to the rules which may be made, for regulating the conduct of innkeepers as to the time their houses shall be kept open, the security they shall give, the duration of their licenses, and other objects of the like nature. But in this case, it cannot by any reasoning, be made to apply, as the only *ordinance* produced is one made within the last of the four years, for which we claim a return of the imposition.

THE only remaining argument is drawn from the *proviso*, that the Mayor &c. shall not have power to regulate the price of merchandize, provisions, &c. nor to tax *butchers* or *bakers*, nor *carts* nor *drays*, otherwise than for the licenses therein provided for. The taverns, it is said, are omitted here, and therefore, there is a right to

tax them. This is strange reasoning and would go to permit an indefinite tax on any particular calling, profession or trade, except *butchers*, *bakers*, *carts* and *drays*. Physicians, merchants, shop-keep rs, lawyers, tradesmen of every description, are made liable to an arbitrary tax, and the whole expences of the city may be thrown on one description of citizens (retail shop-keepers for instance) who may not happen to have a proper interest in the city council. This is certainly a power which shall not be supported by implication, nor without the most express grant.

IT is also worthy of remark that the charter gives a power to make such bye-laws only, as shall not be contrary to the *Constitution of the U. S.* If this means any thing, it must mean that the bye-laws shall not be contrary to the regulations of the Constitution of the U. S in *pari materia:* otherwise, it is difficult to conceive how the bye-laws of a corporation can be contrary to the Constitution of the U. S. If this be the case, then the power contented for, would be forbidden by the section which declares that all duties, impositions and excise, shall be equal.

THIS first point has not been strongly urged, and I think we may safely say, that there is nothing in the law of 1805, incorporating the city, which vests in the defendants, the right of exacting an arbitrary sum, from any particular profession or trade. I think it goes further and, by

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designating a sum to be paid for a license, excludes all other impositions. It has been said that this sum is only a perquisite of the Mayor, and therefore, not a tax. It is a perquisite, but not less a tax; the application is indifferent to the person who pays, whether it goes into the pocket of the Mayor or the coffers of the corporation, makes no difference to him.

II. If the city then have no original power given them by the act of incorporation to lay this tax, can they derive it from any former powers of the cabildo, confirmed to them by that act?

THE 13th section enacts "that all the estates, "whether real or personal, the rights, dues, debts, "claims, or property whatsoever, which here- "tofore belonged to the city of New-Orleans, "or was held for its use by the cabildo, under "the Spanish government, the municipality, af- "ter the transfer of the province, in the year "1803 to France, or the municipality now ex- "isting, which has not been legally *alienated* or "*lost* or *barred*, shall be vested in the said Mayor, "&c. to be enjoyed, received, collected and sued "by them and their successors forever."

HERE, three enquiries present themselves:

1. Whether this power of taxing inns and taverns, supposing it to have been legally exercised by the cabildo, is by this section vested in the Mayor, aldermen and inhabitants of the city of New-Orleans.

2. Whether it was ever vested in the cabildo, and to what extent.

3. Whether, if it were *vested* in the cabildo, it was not *lost*, prior to the act of 1805.

I. The words are *rights, dues, debts, claims, or property whatsoever.* What is the thing contended for? A *power* to tax a particular description of persons—will this be given by the expression *rights*, which is the one selected as conveying it? It may, I think, very reasonably be doubted, more particularly as this term may be fully satisfied without recurring to the broad exposition which is contended for, as there are among the objects secured to them, certain rights strictly so called, such as a right to a perpetual rent, &c. The observations before made, as to a strict construction of this kind of grants, will here forcibly apply. Suppose the cabildo had formerly the power of laying all kinds of taxes in the most unlimited manner; and this charter had no other clause on that subject, than the one now under discussion—would these general words have revived the right of taxation? It is believed they could not. This is certainly a *political power*, and I think the true construction of the clause in question, is that it transfers from the cabildo to the corporation, only *private rights:* an opinion which, I believe, will be strenghtened by a consideration of the context. "All the estates "and rights, dues, debts, claims, or property "whatsoever, which, heretofore, *belonged* to the

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"city of New-Orleans, or was held for its use." Now the terms "*belonged*" *and held for its use*" evidently apply to *private property*, not the *power of taxation.*—

LUT, if these words should be deemed sufficiently operative to vest the power, they can give no more that was legally exercised by the cabildo, and not even that, if it shall appear to have been *lost*, at any time before the incorporation.—

II. We must enquire then, whether this power was ever legally vested in the cabildo—to what extent, and whether it has not (if it ever existed) been lost by the events which took place prior to the passage of the incorporating law.—

To prove this power legally vested in the cabildo, an ordinance is produced promulgated by O'Reilly in 1770, in which he says, that pursuant to the *spirit* of the 1*st law of the* 13*th tit.* 4*th Book of the laws of the Indies*, he should proceed to assign to the city of New-Orleans, the corporate property *(proprios)* necessary for the city expences. That therefore, untill his majesty should pronounce thereon, he had assigned, *inter alia*, 40 dollars, which each of *the* 12 *taverns*, *(tabernas) which are permitted* in the city are to pay annually.—Also, other 40 dollars, which, each of the six billiard-tables, are to pay annually; other 40 dollars, to be paid annually by the house in which lemonade and other refreshments are sold, and 20 dollars, which are

annually to be paid by each of the six inns or eating houses *(posadas.)*

Now by referring to the law, the spirit of which Mr. O'Reilly thinks will warrant his transferring this power, it will be found that neither the letter nor the spirit, will bear this construction. The law reads as follows: "The vice-roys "and governors who have the power, shall de- "signate to every town and place, which shall "be *newly founded* and *settled* the *lands* and *lots* "*(tierras y solares)* which may be necessary, "and which may be given without prejudice to a "third person or corporate property *(proprios)* "and shall send us an account of what shall "have been designated and given to each one, in "order that we may *order it to be confirmed.*" This law was applicable only to *newly founded cities;* the spirit, however, might without a forced construction extend it to a city acquired by conquest or cession: but, neither the letter nor the spirit, could ever authorise the transfer in favor of a city of the right of taxing. The words are explicit, shall designate lands and lots, and those only on condition of their being confirmed. There is also, a positive prohibition on this subject, contained in the 1*st. law*, 15 *tit.* 4 *Lib. of the law of the Indies.* "We ordain that no com- "munity, nor individual of whatever state, dig- "nity or condition he may be, shall impose any "*excise, duty or contribution*, without our special

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"license, unless it be in the cases permitted by "law and the laws of this book, and we revoke "and hold for null those which shall be intro- "duced in any other manner." Here then, it appears that the law which the governor cited as his authority for vesting the cabildo, did not give it him, and that he was moreover expressly forbidden by another law, from exercising it. If he had not cited his authority, the court might, perhaps, have presumed that it was duly exercised, but since he has done so, they are bound to examine it.—If the grant, therefore, was made by an officer who had no power to make it, nothing passed by his grant, no power was legally vested in the cabildo, and of course, nothing was transferred to the corporation of New-Orleans, by the territorial act.

BUT if he had the power, the grant was made subject to the confirmation of the king, and that confirmation has never been obtained : it is, therefore, void. See the words of the act I have quoted, the governor "shall send an account of what shall have been designated *that we may order it to be confirmed*"—O'Reilly's ordinance too contains the same claim.

BUT, if this power was legally vested in the cabildo, what was the extent of that power? Clearly, I think, no greater than is warranted by the words of O'Reilly's grant, that is, 40 dollars on *twelve* taverns, *six* billiard-tables, *one* coffee-house ; and 20 dollars on *six* eating houses.

There is no *reason of policy*, or *probable intent* of the grantor, that will authorise an *enlarging construction*. All these are for narrowing it.

1. *Policy*. It is certainly contrary to every rule of public policy, that a temptation should be held out to intemperance and gaming by multiplying the opportunities for indulgence in them. Such would, undoubtedly, be the effect of suffering the same persons, who draw a revenue from these sources, to encrease the number. Public policy too, would, I think, be for a *narrowing*, rather then an *enlarging* construction of a grant, that trenched even in its strictest construction on so important an attribute of sovereignty as the right of taxation.

2. *Probable intent of the legislator*. This is referred to, by the best writers as the surest test of the true meaning of an act. It is to be gathered first, from the words "*the twelve taverns*, that are permitted in this city." Here pains seem to have been taken, and certainly several words employed which would have been useless, if the construction contented for was the true one. Why speak of the number at all? Why recite that that number was permitted? But to restrain—when a single word would have given the enlarged construction. Forty dollars on *all the taverns* which shall be kept" would have been the natural and obvious expression: if the enlarged construction had been the true intent, and the restrictive expressions shew, as strongly as it

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is possible for words to do, the limited nature of the power—if too the inconveniences which I have pointed out, under the head of public policy, would result, it is not reasonable to suppose that it was the intent of the legislator to permit them.

IF, therefore, the grant be valid and vested any right in the cabildo, it was only for the objects specified in the ordinance, and cannot be extended beyond them.—Should I, however, be again mistaken in my reasoning, and should the court think the cabildo was not by the ordinance confined to the specified number, yet they had no right to exact any thing beyond the forty dollars per annum, imposed by that grant upon taverns. Here again, we must recur to the probable intent of the act, and from the words of the instrument, as well as the nature of the thing, there is every reason to believe, that the intent was to keep the several licenses separate, and they were kept so during the whole of the Spanish government here, except in a single instance, that of billiard-tables being kept in *boarding-houses, (posadas)* not taverns *(tabernas.)* Where they were joined in this manner, the two taxes or *sixty* dollars were paid, and this is the highest sum ever received before the year 1805, and that only in cases where the parties applied specially for the two licenses to keep a billiard-table and a boarding house.

Now it is attempted to make another stride,

and not only cumulate the whole of the taxes on an individual desiring the several licenses, but, to impose the taxes of all three on an individual desiring only one—the clerk of the Mayor tells us that no individual, desiring a license to retail liquor, can get any other than one for which he must pay 100 dollars, and which in the opinion of the witness, gives a right to keep an *inn*, a *boarding-house* a *coffee-house*, and a *billiard-table*, but which from an inspection of the license as filled up, gives no such right. It is simply to keep a *tavern*. It is true there is also a clause, that if in addition to the tavern *he keeps* a boarding house, he must comply with the regulations of the police on that subject. This however gives no license for keeping a boarding-house, nor would it be a defence in a suit brought for the penalty (if there be any) for keeping one. But even if it should give these, and even other rights; it is surely an imposition to make a man pay for that which he does not want: before you will give him that which he does, and the Mayor might just as well refuse to give a license to an hackney coach-man, unless he would also take and pay for a marshall's warrant, the commission of scavenger and the liberty of keeping a billiard-table, tavern and eating house in his coach.

IT was admitted on the first hearing and will appear by the books of the corporation that the licenses of the plaintiffs were simply *tavern licenses* and that they paid for each of them one

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hundred dollars per annum. So that they are at any rate intitled to a return of 60 dollars per annum, illegally exacted, if the powers of the cabildo are vested in the corporation and those powers were legal. But I contend further

3. That the power of taxing taverns, even if it were vested in the cabildo, has not been transferred to the corporation, because it comes within the exception, in the latter part of the clause. It is one of those rights, if it be one, which are *lost* or *barred.*

THE power of taxing is a political one. It is an essential part of the *sovereignty* of a nation. However they may delegate it for particular purposes, that delegation can last no longer than while that government retains the sovereignty. When that sovereignty is lost, either by cession or conquest, it goes unincumbered into the hands of the acquiring power, unless there be some special reservation. Now here the only reservation in the treaty, is that the inhabitants shall be preserved in the enjoyment of their *liberty, property* and *religion:* nothing even by *implication* in favor of this delegation of sovereign power, therefore, as the whole sovereignty was ceded first to France and afterwards to the United States, they must take it unincumbered. The power (or right, if they prefer so to call it) of laying this imposition is one of those which were *lost* by the political operation of the double transfer and

is, therefore, one of those expressly excepted by the act of incorporation, even if it be proved that it was legally vested in the cabildo. And the corporation might as well now pretend to the nomination of the *judges*, because the cabildo had the right of electing the *Alcaldes*, as they can now pretend to lay a tax on the taverns, because the cabildo had that right. The right of appointing to office is not more inseparable from sovereignty, than the right of laying a tax: neither can be exercised without the express delegation of the sovereign *de facto*. And both have therefore been *lost* by the transfer of dominion and, of course, are not included in the act.

I have endeavoured to shew

I. That, neither by the words nor the spirit of the act incorporating the city, any *general power* of taxing taverns or other objects specifically is given.

AND that in this instance, it is particularly restrained to the sum designated to be paid for the license.

II. That this power is not given by the reference in the 13th section, to the rights vested in the cabildo.

1. Because, the words of the act of incorporation, are not sufficiently operative to vest these powers.

2. Because, the cabildo itself never rightfully held them. The governor having no power to grant, and his grant wanting confirmation.

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3. Because, if the cabildo ever had such a power it was limited to only twelve taverns and at any rate only to the exaction of 40, not 100 dollars.

4. Because, this power is one that comes within the exception of those rights, &c. which had been before the passage of the law *barred* or *lost*.

THERE remains only one objection to our right of action. It is said that this sum has been voluntarily paid, and that *volenti not fit injuria*.— There are two answers to this objection, one is contained in the authority used to support it. *Evans' essay on money had &c.* says, that this objection can not avail where the money has been taken to permit the enjoyment of a natural right. Now every man has a natural right to pursue such profession as he pleases, provided it be not immoral or immediately injurious. If therefore, any person claiming a power to restrain this right, shall exact money for it, and it afterwards appears he has no such power, the money may be recovered back. Now tho' the corporation have a right to restrict the number of inns, yet they have not yet done it. And the trade is, therefore, *free to all*.

THE other answer is, that whenever money has been paid, by one party *bona fide* to another who innocently or designedly mistakes his powers, it is subject to repetition.

IT was suggested from the bench, that if the right to tax taverns was limited to twelve, that

then all the others acted illegally in procuring their licenses, and as *particípes criminis*, cannot recover the money they have paid. But, there can be no *particeps criminis*, unless there be a corrupt or *criminal intent*, which is not suggested against the plaintiffs. And as strong an answer is, that altho' the cabildo should be limited to recover the tax upon only twelve taverns, yet, it by no means follows that all the others are illegal. They will not become so, untill some law has been passed, restricting the number, which has not appeared.

Moreau and *Duncan* for the defendants. We are not unwilling to admit, with the plaintiffs' counsel, that the charter of the city of New-Orleans, like all other statutes made in derogation of the general law, ought to be construed *strictly:* but we cannot join him in his assertion, that the power of taxing, being one of the attributes of the sovereignty, is not to be presumed to be granted, but by *express words*. For, in the case of *Blanc & al.* vs. *the Mayor &c. ante* 125, the court said, that corporations, the charters of which are silent as to the right of laying taxes, must have that right, as an incident to their incorporation : that it rises *ex necessitat rei*, and as the government of a city, cannot be supported without money, and as money cannot be raised without taxes, the authority to govern necessarily draws with itself that of laying taxes.

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THE corporation is very far from raising its pretentions to the right of laying any indefinite tax on any calling or profession, or to lay any tax on any profession, which is not specially and expressly liable to taxation, under their charter.

IT is under the 13th section of their act of incorporation, cited by the plaintiffs' counsel, *ante* 246, that the defendants conceive they are authorised to retain the money which the plaintiffs have paid them, for their respective licenses to sell liquors, keep a billiard-table and boarding-house.

THAT section vests in the defendants all the rights which heretofore belonged to the city of New Orleans, and our adversaries have shown, that in the year 1770, the city was endowed with the right of receiving 40 dollars, for each tavern and billiard-table, and 20 dollars, for each of the boarding-houses which were then established and allowed, within the city. In this clause, the tax has appeared to them fixed and definite, and the keepers of taverns, billiard-tables and boarding-houses, expressly pointed out, as the persons from whom it might be exacted.

IT is thought useless to inquire whether O'Reilly exceeded his powers, and wrongfully construed the Spanish law, under which he assigned the *proprios* of the city. It suffices for us that he made the assignment, and that the right assigned was held by the city, under his

grant, as long as the country remained under the dominion of Spain. The act of incorporation vests in the Mayor &c. *all the rights..... which heretofore belonged to the city of New-Orleans.* The right of receiving the tax, belonged, at least *de facto*, and we contend *de jure*, to the city. It was therefore granted by the charter.

THE *right of taxing* is not claimed: but only that of receiving a tax already imposed. So that the law of the Indies, cited by the plaintiffs, was not violated.

O'REILLY'S assignment, of the *proprios*, is expressly made, till *the king's pleasure shall be known.* It had, therefore, an immediate effect, which might be suspended or destroyed by a contrary declaration of the royal will. The king's confirmation was not essential to its validity, it perhaps would have had no other effect, than to strengthen the assignment, so as to take it out of the governor's power to make any alteration, which, till after the royal confirmation, he perhaps might do. *Eodem modo quo quid construitur, eadem modo destruitur.*

BUT, it is contended that the assignment did not authorise the city, to collect any money from a greater number of taverns, billiard-tables and boarding-houses, than that mentioned by O'Reilly. Policy seems to require, it is said, that the temptation to intemperance and gaming, should not be encreased, by multiplying the opportunities of indulgence; which would be the effect

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of suffering the persons who draw a revenue from these sources, to increase the number.

TAVERNS, billiard-tables and boarding-houses, were licensed under the Spanish government, by the governor : so that the officers of the city, who drew a revenue from them, could be under no temptation improperly to increase it; for they were without the power.

As the population of the city increased, new houses were licensed, and as the wants of the city kept pace naturally with the increase of its inhabitants, it was in the order of things, that the sources of its supplies, should also be multiplied. It would have been hard, when the number of these houses was doubled, that a half of them alone should be mulcted.

O'REILLY subjected *all* the taverns, billiard-tables and boarding-houses, at the time in the city, to the tax : and when new ones arose, it was right for the city to say, they should pay also. *Ubi eadem est ratio, eadem est lex.*

THIS, no doubt, is the construction that we would give to the assignment, if we were not furnished with complete evidence, that it was the one which prevailed as long as the Spaniards had possession of the country. This appears from the return of Don Juan de Castanedo, *mayordomo de proprios* of the city, a short time before the cession : from which it appears that there were then sixty two keepers of *tabernas* in the

city, paying the 40 dollar tax each : ten keepers of *posadas* and billiard-tables, paying 60 dollars each : eight keepers of billiard-tables, paying 40 dollars each and eight keepers of *posadas* paying 20 dollars each. The assignment was then, therefore, construed to extend to all taverns &c. existing at the time of the collection. *Optima est cotemporanea expositio.*

IT is next contended, that the corporation has no right to cumulate the permissions of keeping a tavern, billiard-table and boarding-house.

THE return of the *mayordomo* is evidence that such a cumulation prevailed in the case of boarding-houses and billiard-tables. In addition there is a resolve of the cabildo, on the representation of the *mayordomo*, authorising the cumulation of these several taxes, on a license for the several objects.

AN ordinance of the municipality during the short time, that the province of Louisiana was in the possession of the French, fixes the tax on taverns, *cabarets* or grog-shops, at 60 dollars per annum.

AND an ordinance of governor Claiborne, of the 25th of February, 1805, while he exercised the functions of governor-general and intendant, authorises the municipality to give licenses to keep coffee-houses, inns, billiard-tables and grog-shops, and appropriates the tax imposed on each of said licenses, to the use of the city.

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So that the right, not of taxing, but of receiving taxes imposed on, taverns, billiard-tables and boarding-houses, belonged to the city of N. Orleans, at the time it received its present charter and was therefore confirmed by it, unless it can be shewn that it *has been legally alienated, lost or barred.*

The plaintiffs' counsel contends, that the power of taxing is a political one, an essential part of the sovereignty, which must, by the cession have passed to the United States. There is certainly a difference between the power of taxing and the right of receiving the produce of a tax, already imposed. This right the city never lost, for they exercised it without interruption, under the Spanish, French and American governments, till it was confirmed by the charter and have ever since continued to enjoy it under that instrument.

MARTIN *J.* The city having enjoyed the right of receiving a tax on billiard-tables, taverns and boarding-houses, during a period of upwards of forty years, the whole time that it was under the dominion of Spain, that right would be considered as one of those to which the legislature made a reference by the words, *rights....which heretofore belonged to the city*, even if it were clearly proved, that O'Reilly had exceeded his authority.

THE number of taverns &c. which existed at the time of the assignment, appears to me to

have been inserted, to describe rather than to limit, the objects of taxation. The reason of the thing, and the cotemporaneous construction of the officers of Spain, lead to this conclusion. The act of 1806 ch. 10, which lays an imposition on taverns *without the city*, impliedly recognises the liability of those within, to a tax for the benefit of the city. I feel no difficulty, therefore, in saying that the city may exact the tax from every tavern, billiard-table and boarding-house.

WHETHER they may cumulate two or the three taxes in one license, is a question which must surely be answered in the affirmative, in every case in which the applicant for a license desires it for the cumulated objects. As it appears from the books of the mayoralty, which have by consent been read in evidence, that a license authorising the plaintiffs respectively, to keep a tavern, billiard-table and boarding-house, was received and paid for, by each of them, and there is no proof of an application for a limited license, the court cannot presume, that the plaintiffs were not satisfied therewith. They have enjoyed the faculty for which they have paid.

I am, however, not ready positively to say that, if it were in proof, that one of the plaintiffs had made application for a license to sell liquors, keep tavern, *taberna*, and expressed his unwillingness to receive one, authorising the keeping of a billiard-table, &c. and on the refusal of the

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officers of the Mayor, had yielded to the necessity and taken a license and paid for the cumulated objects, he could have been relieved. For, it would have, perhaps, been his duty to apply to the city council, who might have considered his application, and given orders to accomodate him.

NEITHER is it very clear, that this cumulation is an extortion. No one has an absolute right to demand a license. The city council might from reasons of policy confine to boarding-houses, the sale of liquors and the keeping of billiard-tables. By confining to a small number, establishments which have a tendency to promote noise and disorder, the vigilance of the officers may be more successfully employed.

It is true, the passing such ordinance might be attributed to motives of avarice. But improper views will not be presumed in a body of magistrates, while correct ones naturally present themselves. Whether it would increase the revenues of the city, is a problematical question. Many who willingly would take a license for any one of these objects, would abstain from it, if it could not be obtained without being joined to the others.

LEWIS *J.* Neither of the plaintiffs is entitled to relief, unless he shew that his application was for a single license. If he took one for the cumulated objects, on the presumption that a single

one could, by no means, be obtained, he must fail in his application to be reimbursed, because he has neglected to provide the evidence of the injustice, which he contends has been done to him.

I cannot join, however, in the opinion that the city council may lawfully withhold a license for one of the three enumerated objects, with a view to raise the tax on it, by compelling the applicant to take one for the other two also.

CUR. ADVIS. VULT.

EMERSON vs. *LOZANO.*

Party, disabled timely to pray an appeal, relieved.

JUDGMENT being had in the parish court, against the defendant, who was absolutely disabled to attend to his suit, by a violent sickness, in the paroxysms of which he was frequently delirious; after the time during which an appeal could be successfully prayed, so as to prevent the execution issuing, he moved for a *certiorari* to bring up the record of the suit, and a *supersedeas* to the sheriff: upon affidavit of merits, stating the deranged situation of the affairs of the plaintiff, which rendered it doubtful that, in case of success, the defendant might obtain his money back, if he paid it to the sheriff. The defendant further offered to pay the amount of the judgment in the clerk's office, on the court making an order that it might remain there, till the appeal was de-

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termined. The defendant had no counsel in the parish court, being himself an attorney.

By the Court. Since the defendant offers to pay the money into court, it would be wrong in the court not to hold him thereto. When the merits of the cause are sworn to be with the party who seeks for a reconsideration of the case in this court, and it clearly appears that without any latches on his part, and by events not within his control, he has been disabled from praying the appeal in due time, so as to prevent the issuing of the execution, this court will relieve against the accident, if the applicant be ready to place his adversary in as safe a situation, as if the application had been made below in due time.

MOTION ALLOWED.

Livingston for the motion. *Depeyster* contra.

SYNDICS OF SEGUR vs. *BROWN.*

Referees may report specially.

THIS suit having been submitted to referees, under the acts of assembly of 1804, *c.* 2. *s.* 2. and 1805. *c.* 26. *s.* 20. They made a report, stating the accounts of the parties, referring the determination of the question that arose upon them, to the court.

Mazureau, moving that the account might be

recommitted. The referees ought to have finally passed on the whole matter in dispute.

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Duncan contra. By the first act, the referees are to state the accounts, and report their opinion thereon to the court. By the latter, they are to make their report, "which shall be conclusive "*as to the state of such accounts*, if the same "shall be confirmed by the court."

By the Court. An award must be final, because the arbitrators are the judges whom the parties have chosen for themselves. Not so, the report of referees, who are only appointed to ease the court of the labour of scrutinising long and intricate accounts. This is the principle of the Spanish law: *no se han de nombrar para ningun articulo que consista in* DERECHO; but, *en caso que consista en cuenta ô tassacion, ô pericia de persona ô arte. Cur. Phil.* 89. *n.* 26.

MOTION OVERRULED.

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SUIT on the defendant's endorsement of a note. The note was produced with the protest containing a clause by which the notary public certified that he had given notice of the want of payment to the endorser.

Strict proof required of notice to the endorser.

A witness who had been a clerk to the notary public, now dead, testified that he was a man

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scrupulously attentive to his business, executing every part of it with minute attention.

By the Court. The clause in the protest, certifying that the notary gave the notice is not evidence. It is no part of the duty of these officers to give notice, in case of a protest; and if they give it, they do so as private individuals and as such must prove the fact, like all other witnesses, upon oath. The proof of notice is a matter *stricti juris:* we cannot take it on the presumption which arises from the notary's reputation of great correctness.

In a late case, the notary of one of the banks informed us, it was customary for him to give notice and to certify that he had done so: and when the endorser, after a reasonable search after him, could not be found in town and had no domicil, at which notice might be left, to certify that notice had been given—that such were the directions he had received at the bank. It is possible that Mr. Fitch, the notary whose protest is before the court, may have acted on the presumption that such a conduct might be justified. It is extremely improper. There being no proof of notice to the endorser there must be

JUDGMENT FOR THE DEFENDANT.

Brown for the plaintiffs. *Ellery* for the defendant.

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THE MAYOR &c. OF NEW-ORLEANS.

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Whether the city of New-Orleans may drain its waters in the canal Carondelet?

THIS was an action brought to try the right of the corporation of the city of New-Orleans, to drain the waters of the city into the bayou St. John, through the canal Carondelet.

THE city is built on the Mississippi, the banks of which gradually slope from the river, so that the rain water runs from them into a cypress swamp, which lies behind the city, parallel to the river, and through which runs a creek called the bayou St. John.

IN the year 1794, a canal was dug from the city, through the swamp, to the bayou St. John, which the corporation of the city contended irrevocably altered the natural course of the waters from the city and its environs.

THE navigation company considered the canal as one of the navigable waters, which their charter authorises them to occupy and improve: under the idea that whatever might have been the original destination of the canal, its last and permanent one was to be exclusively applied to the purpose of navigation. They erected a dam to give a new direction to the water, so as to prevent its falling into the canal.

THIS dam having been destroyed by order of the city council, the present suit was brought.

BY consent, a paragraph from the *Moniteur de la Louisiane*, of the 26th of May 1794, was

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read, announcing the intention of government to dig a canal, which, carrying the waters of the city and its environs, in one of the branches of the bayou, would rid it of the stagnating ponds which contributed to its sickness, and the vast quantities of musquitoes, that rendered it unpleasant in summer.

THE paper further states that the expenses of the war allowing no hope, to obtain any aid from the royal treasury, for the digging of a considerable canal of navigation, government had asked nothing from his majesty, but the stay of the chain-negroes, by whose labour and that of such hands as might be supplied by zealous individuals, a canal *d'égoutement*, for carrying off the water, might be dug, which in successive years might be changed into a canal of navigation for schooners—that the king had assented to the proposition. The intention of the government is next announced, to request from the inhabitants of the city, in the month of June following, such number of negroes, as they might supply, to clear the ground thro' which the canal was to pass : promising that, this being done, the chain-negroes would dig the canal.

AN eight foot passage, it is said, will be left on each side of the canal, for the horses drawing the flat-boats, and in time the schooners ; and a wide levee is to be destined to foot travellers, and, under a double row of trees, afford an agreeable walk.

ANOTHER paragraph of the same paper, dated the 19th of November 1795, announces that six days of the labour of the negroes in the city, and within fifteen miles around it, will enable government to complete the canal, so far that the schooners might come up to the city : and the people are solicited to send their slaves.

A circular of the 15th of September, noticing the advantages the city had derived from the canal, in procuring fire wood with greater ease, in the marked diminution of mortality during the preceding season, and the draining of the water from the back part of the city, presses the civil officers, to solicit from the inhabitants, additional aid of slaves, expatiates on the advantage the commerce of the city will derive from the canal and the satisfaction the people will have in beautiful shaded walks, on each side of the canal.

A paragraph in the *Moniteur* of the 23d of November, asks for eight days work of a slave from each of the inhabitants of the city and neighbourhood, promising that after this aid, the chain-negroes would be able to complete the canal.

A royal schedule was next introduced, dated May 10, 1801, by which the king yielded his assent to the governor's representation that the three hundred toises, *de las tierras comunes*, of the commons, out of the city, nearest to the

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fortifications, which in their situation produced nothing, being covered by water more than six months in the year, might be divided into small lots of seventy toises in front and one hundred and fifty in depth, and let out for a moderate rent, to such inhabitants of the city, as might wish to occupy them as gardens, and the money thus raised applied to the lighting of the city: so that in the course of a few years, the whole ground might, by tillage, be raised above the level of the water: the occupiers of these lots draining them by trenches into the canal Carondelet, so as to put an end to the putrid fevers occasioned by the stagnation of waters in ponds near the city, which were attended with so much mortality.

THE engineer, who directed the digging of the canal, testified that before that time, the ordinary and natural disgorgement of the waters of the city, was on the place on which the canal was dug: tho' another respectable witness assured that it was at some distance, behind the hospital.

IT was in evidence that the inhabitants of the city and neighbourhood freely sent their slaves to work.

A resolve of the city council was offered, by which that body determined not to prevent the throwing up of the dam, raised by the navigation company. This resolve, however, had not the approbation of the Mayor; nor did it appear to have been sent to that officer for it.

Livingston for the plaintiffs. The charter of the navigation company, 1805 *c.* 1. *sec.* 7, authorises the plaintiffs to "enter into and upon "all and singular the lands covered with water" for the purpose of improving the navigation of the territory: and the 12th section provides that "if any person shall break down or destroy "any embankment or other work, lawfully erect- "ed by virtue of this act.....besides making good "all the damage occasioned thereby...shall for- "feit and pay,...the sum of one hundred dollars."

IT is to be observed that this act ought to have the force of an act of congress, for it was passed by the legislative council of the territory, whose acts were liable to be repealed by congress: and congress, not having done so, have impliedly given it their sanction. Nay they have recognised it, having made it an express condition of a grant of land to the city, that a gratuitous conveyance should be made to the plaintiffs, of as much of the commons of the city, as shall be necessary to continue the canal Carondelet, from the present basin, to the Mississippi. 1807, *chap.* 27.

THE plaintiffs were then authorised by the legislature of the territory and that of the Union, to enter upon the land on which the trespass has been committed and prepare the water course for navigation. In the execution of this authority, they erected the dam, which the defendants

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have destroyed—a *work*, in the language of the plaintiffs' charter, *lawfully erected by virtue of this act.*

THE publications, in the *Moniteur*, clearly shew that the primary object of the canal was navigation, altho' at first and until this end could be attained, another was held out as an inducement to the people to send their negroes, the draining the stagnating water from the back of the city.

BOTH the objects could not be simultaneous for one would necessarilly prevent the other. The draining the waters and carrying off all the filth of the city into the canal, must, in a very short time, fill it up and render it absolutely unfit for navigation.

THE paragraphs in the *Moniteur*, which are believed to be official, convey ideas which repel the presumption that the canal was intended to be the receptacle of the filth of the city. They speak of *double rows of trees, affording an agreable walk*, of *the satisfaction the people will have in beautiful shaded walks on each side of the canal:* advantages inconsistent with the belief that the surface of the water, between these promenades, will be covered with dead animals and the sweepings of the yards and streets of the city.

THERE was then a time, when the destination of the canal was to be altered and instead of being a canal *d'égoutement*, it was to become a

canal of navigation. The legislature have declared that that moment was arrived, when they vested in the plaintiffs, the right of improving this water-course, as well as all others susceptible of that kind of improvement.

LASTLY: were we to admit the right of the city to the canal as a drain, the city council, by their resolve, have completely parted with it. It is true this resolve does not appear to have been sent to the Mayor for his consideration. By the 11th section of the act of incorporation, all resolutions of the city council for the disposal of public property are to be "sent by the said council to the "Mayor, immediately after the same shall be "passed." Of this sending, in the present case, the plaintiffs cannot have any evidence. But the rule *omnia recte acta* is surely applicable to this case, and the council are not to complain, when we presume they have done their duty.

Moreau for the defendants. Every undertaking which alters the running of the public water, is forbidden. *Arg. legis* 16 *ff. Loix Civiles, liv.* 2, *tit.* 8, *s.* 3, *n.* 11. *Franc. Marc. t.* 1, *q.* 589, 597. Inferior land must receive the water of superior. *Lelaure des Servitudes*, 19. Servitudes are acquired by grant or use. 3 *p. l.* 14, *t.* 31. *Ley* 15, *eod. tit.*

THE plaintiffs are incorporated "for the "purpose of improving the internal navigation "of this territory." This, perhaps, authorises them to occupy and improve all natural water

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courses susceptible of improvement, but certainly, does not vest in them artificial canals, made at the expense of other persons, and for particular purposes, as the canal Carondelet and the canal Marigny.

THE canal Carondelet was dug, at the expense of the inhabitants of New-Orleans, with the aid of the chain negroes, *granted to them* by the king, on the representation of the governor, whose name it bears: and we are informed, from high authority, that, if the expenses of the war had not forbidden it, an aid would have been obtained from the royal treasury.

THE papers read in evidence clearly establish this proposition that the canal was built at the expense of the inhabitants, who spared their negroes, aided by the king's grant of the labour of the chain negroes, at the instance and solicitation of his representative in the province.

IT was dug for a particular purpose: that of ridding the city "of the stagnating ponds which "contributed to its sickness and the vast quanti-"ties of musquitoes, that rendered it unpleas-"ant in summer," and the idea is held out that, in successive years, it might be changed into a canal of navigation for schooners.

SURELY, the city, from the moment the canal was dug, rightfully claimed the use of this canal, which it had acquired partly for a *valuable* and partly for a *good* consideration. A right which

if it wanted confirmation, and if that confirmation could be given it by the legislature of the territory, was confirmed by that body, in the charter of the defendants, which is anterior to that of the plaintiffs.

ADMITTING for argument's sake, that the charter of the plaintiffs vested any right to the use of the canal, it did not authorise them to alter the course of the water. It did not vest in them the right of determining (alone and without the concurrence of the party, who had an interest in resisting the change) that the moment had arrived when the canal was to become a canal of navigation and a canal of navigation only. The act of the legislature cannot be said to have done so, by implication: for they do not appear to have had this canal in contemplation, indeed any artificial canal dug for a particular purpose, *iniquum est perimi pacto, id quod cogitatum non est.* And had they thought of it, they could not have done it; for such canal has necessarily an owner: and that owner was, either the city, or the United States, who might claim it as successors to the crown of Spain.

BUT, surely, even if the city have no right to the canal, they certainly have that of preventing a diversion from the actual course of the water. The present direction is, either the natural one, as one of the witnesses has sworn, or the one which has been given to it, by the concurrent

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act of the king and the city, the only parties who had an interest therein.

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LEWIS *J.* The city have no right in the canal. They never had any. The negroes who were sent to aid those of the king, (the chain-negroes,) were the property of individuals, who willingly yielded their labour, without stipulating for any advantage to themselves or to the city. It was a voluntary curtesy. Nay, if the advantages held out by the governor to induce the inhabitants to send their negroes, may be viewed as the consideration of their services, they have already had the full benefit of it. The canal was not to be used as a drain for ever. It was expressly mentioned to them, that in time it would be changed into a canal of navigation for schooners. This time has arrived, and as the use of the canal, as a drain, is incompatible with the use of it, as a canal of navigation, the city have no longer the right to empty the waters of their streets into it.

MARTIN *J.* I think differently. It is far from being clear to me, that the canal cannot be used both as a drain and a stream for navigation. Witnesses have informed us, that in the latter years of the Spanish government, large wooden gutters, *gargouilles*, had been placed on each side of the canal, the issues, of which were stopped in time of rain, and the water suffered to settle and deposit the earth, it brought down, and when perfectly clear, it was allowed to find its way thro' the canal. Thus the filling up of

the canal was prevented and dirt was procured to raise the ground near it. As late as the year 1801, the royal schedule mentions the king's intention that trenches might be dug to convey the water from the commons into the canal. Hence, I infer that the natural direction of the waters, of the city and the commons was, by the sovereign's authority, changed and established as it now is. No one has a right to alter it.

Denisart, verbo LABOUR, cites a case determined in one of the parliaments of France, *Laurent vs. Warin*, in which the court held that "when in a "piece of land, there is a water course which "carries off the rain water, it is not lawful for "the owner of the land to give it another direc-"tion over the land, if the alteration occasion "any detriment to the adjacent estates." Thus the law of France, the original law of this country, corresponds with that of Spain. If a new direction is now given to the waters of the city, the owners of estates below it, down to the bayou, will not be obliged to give it passage over their land, in which they may have made improvements incompatible with the passage of these waters. Having bought their estates free from such a burden, they will now resist the imposition of it.

NEITHER, can I refrain from considering the advantage, held out to the inhabitants, the clearing of stagnating ponds, which occasioned deadly fevers, and gave birth to myriads of musquit-

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oes, which so desolated them, that their houses became inhabitable, as objects of major importance, and as the price promised them for the labour of their negroes. If the all-powerful hand of the sovereign might at all times, despoil them of these purchased advantages, of which there is no evidence, their right to them, like all other rights, has been strengthened and rendered less precarious by the change of government. Surely in the most despotic, they could not fairly have been deprived of it. *Turpis est fidem fallere.*

I cannot construe the plaintiffs' charter as affecting the defendants' rights. According to the counsel of the former, the city are to lose both the promised advantages—the use of the canal as a drain—the use of it as a stream of navigation. For it is to lose it as a stream of navigation, if they must pay for navigating it : the canal then will not be the property of the defendants, but of the plaintiffs.

THE city council have not parted with any of their rights by their resolve. It is not to be presumed that it was their intention to make a present to the plaintiffs. *Nemo presumitur donare.* The reason, that this resolve was not sent to the Mayor for his consideration appears to me to be, that it is not *for the disposal of any public property, or the payment of any monies.* Resolves, for these objects, being the only ones that require the Mayor's consideration.